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WHAT THEN MUST WE DO?: WHY *RUBIN v. ISLAMIC REPUBLIC OF IRAN* LEAVES VICTIMS OF STATE SPONSORED TERROR ATTACKS WITH FEW GOOD OPTIONS

Abstract: The United States Supreme Court should have expanded § 1610(g) of the Foreign Sovereign Immunities Act to allow United States victims of foreign state sponsored terror attacks to file attachments against any kind of property owned by a foreign government. This would have provided victims with a viable opportunity to execute the judgments of United States courts against foreign state defendants. Without an expanded § 1610(g), victims will continue to be trapped without any realistic path to recover the full amount of damages they have sustained.

INTRODUCTION

On the afternoon of September 4, 1997, three individuals walked into a busy pedestrian shopping center on Ben Yehuda Street in downtown Jerusalem.¹ Once they were in position and within sight of one another, all three attackers—including one disguised as a woman and another as an elderly man—detonated shrapnel-filled bombs attached to their bodies.² The blasts ripped through the crowded street, killing four people and injuring around two hundred more.³ Among the injured were eight U.S. citizens, including a woman named Jenny Rubin.⁴ Hamas, a Palestinian terror organization that received

¹ *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261 (D.D.C. 2003); 143 CONG. REC. H6804 (daily ed. Sept. 4, 1997) (statement of Rep. Snowbarger); 1997: *Suicide Bombings Put Peace in Doubt*, BBC (Sept. 4, 1997), http://news.bbc.co.uk/onthisday/hi/dates/stories/september/4/newsid_2499000/2499009.stm [<https://perma.cc/JSA5-RG3Q>]; 7 *Killed by Bomb Blasts in Jerusalem*, CNN (Sept. 4, 1997, 10:02 PM), <https://web.archive.org/web/20180814065728/http://www.cnn.com/WORLD/9709/04/israel.blast.930/> [<https://perma.cc/5PFD-RZHV>]; Yair Sheleg, *A Short History of Terror*, HAARETZ (Dec. 3, 2001, 12:00 AM), <https://www.haaretz.com/1.5482716> [<https://perma.cc/7DZW-VMR4>].

² Serge Schmemann, *3 Bombers in Suicide Attack Kill 4 on Jerusalem Street in Another Blow to Peace*, N.Y. TIMES (Sept. 5, 1997), <http://www.nytimes.com/1997/09/05/world/3-bombers-in-suicide-attack-kill-4-on-jerusalem-street-in-another-blow-to-peace.html> [<https://perma.cc/39EC-Z45X>]. The attacks occurred weeks after a similar but more explosive bomb detonated on July 30 in another neighborhood of Jerusalem, killing fifteen. *Id.* See *infra* note 84 and accompanying text, for more information about the victims, including the damages they sustained from the explosion.

³ 7 *Killed by Bomb Blasts in Jerusalem*, *supra* note 1. Among the dead were three girls, age twelve, fourteen, and fifteen respectively, along with an unidentified man and the three bombers. *Id.*

⁴ *Campuzano*, 281 F. Supp. 2d at 260–61; Lawrence Hurley, *U.S. Top Court Takes Up Fight Over Ancient Persian Artifacts*, REUTERS, (June 27, 2017), <https://www.reuters.com/article/us-usa->

material support from the Iranian government to carry out these attacks, quickly took responsibility for the bombings.⁵ The United States District Court for the District of Columbia held that the Islamic Republic of Iran was a state sponsor of terror and was therefore responsible for the damages that the victims sustained as a result of the attack.⁶ Soon after the ruling, the victims began fighting for compensation for the damages they sustained.⁷

The U.S. legal system has struggled to provide American victims of terror attacks with an effective vehicle to recover financial compensation for their

court-iran/u-s-top-court-takes-up-fight-over-ancient-persian-artifacts-idUSKBN1911R8 [https://perma.cc/GD9U-QQ3F].

⁵ *Campuzano*, 281 F. Supp. 2d at 270; Schmemmann, *supra* note 2. Foreign sovereigns provide “material support” to a terror organization by supplying funding, training, tactical advice, weapons, and logistical guidance. *Allan v. Islamic Republic of Iran*, No. 17-338, 2019 WL 1330829, at *4 (D.D.C. Mar. 25, 2019). In a statement, Hamas demanded the release of all Arab prisoners held by Israel, specifically Sheikh Ahmed Yassin, the spiritual leader of Hamas. Schmemmann, *supra* note 2. The bombings on July 30 and September 4 were widely believed to be related. *Id.* The shrapnel used in each—mainly nails, nuts and bolts—came from the “same package” of materials. *Id.* Both attacks also preceded a high-profile diplomatic visit from a U.S. government official, Middle East mediator Dennis Ross in July and Secretary of State Madeline Albright in September. *Id.* Shortly after the attacks, Muaid Said Bilal and Omar Abdel Rahman al-Zaban were arrested for, and convicted of, multiple counts of murder, attempted murder, and being active members of the Hamas terror organization. *Campuzano*, 281 F. Supp. 2d at 261. Both men gave detailed accounts of the September 4 bombings, including how they were planned and financed. *Id.* at 261–62. During an initial trial in 2003 that involved many of the same defendants and plaintiffs participating in the instant action, a Washington, D.C. district court found that the government of the Islamic Republic of Iran provided material support to Hamas. *Compare id.* at 258, 270 (involving victims and perpetrators of the Ben Yehuda bombing), with *Rubin v. Islamic Republic of Iran (Rubin III)*, 830 F.3d 470, 473 (7th Cir. 2016) (involving the same plaintiffs and defendants), *aff’d*, 138 S. Ct. 816 (2018).

⁶ *Campuzano*, 281 F. Supp. 2d at 262. The court held that Iran had a specific branch of its government, called the Ministry of Information and Security (MOIS) with a budget between \$100,000,000 – \$400,000,000 at the time. *Id.* Trial transcripts revealed that the MOIS spent between \$50,000,000 – \$100,000,000 each year sponsoring various terrorist activities across numerous organizations. *Id.* The Iranian Revolutionary Guard is the military wing of the MOIS and trained many Hamas operatives who would go on to execute terrorist attacks in the Middle East. *Id.* This kind of material, extensive, and continuous support was a direct result of official Iranian state policy and was sanctioned by high-ranking government officials, such as Ayatollah Khomeini. *Id.* Regarding the September 4, 1997 attack on Ben Yehuda street, testimony at the trial conclusively showed that the bombing could not have happened without Iranian support. *Id.* at 261–62. Furthermore, the U.S. Department of State has listed Iran as a state sponsor of terrorism since 1984. *Id.* at 262. Because Iran provided direct military and material support and because this support was approved by the highest levels of the Iranian government, the court decided that Iran was a state sponsor of terrorism. *Id.* at 269. This designation paved the way for the plaintiffs in the instant case to continue to fight the government of Iran for compensation for the damages they sustained as a result of the Ben Yehuda bombing. *Rubin III*, 830 F.3d at 473.

⁷ *Id.* at 474–75 (detailing the lengthy legal journey taken by the plaintiffs in search of compensation, including initially winning a default judgment in 2003 and numerous procedural challenges that went up and down the court hierarchy); see *infra* note 84 (providing a description of the damages suffered by the plaintiffs).

injuries.⁸ Many of the injuries that the plaintiffs sustained, like those in the Ben Yehuda bombings, can be traced back to foreign governments that support terrorists responsible for these attacks.⁹ Unsurprisingly, it is difficult to compel such foreign bodies to pay for the consequences of their actions.¹⁰ Courts have provided judgments in favor of plaintiffs for millions of dollars only to have the plaintiffs languish for decades because there is no clear legal path to recovery.¹¹

All three branches of the U.S. government have struggled to create a way for these victims to receive compensation for their injuries.¹² The legislative

⁸ See *Rubin III*, 830 F.3d at 473 (describing difficulties faced by the plaintiffs in attempting to execute their judgment).

⁹ See *Campuzano*, 281 F. Supp. 2d at 270 (holding that Iran provided material support to Hamas for the Ben Yehuda bombings); see, e.g., *Stansell v. Republic of Cuba*, 217 F. Supp. 3d 320, 329, 345 (D.D.C. 2016) (finding that the government of Cuba provided material support to the Fuerzas Armadas Revolucionarias de Colombia—a known terrorist organization—when the organization killed one American and held three others captive after an American embassy plane crash in Colombia in February 2003); *Thuneibat v. Syrian Arab Republic*, 167 F. Supp. 3d 22, 30–31, 34, 36 (D.D.C. 2016) (holding that the Syrian government provided material support to Al-Qaeda, a known terrorist group led by Abu Musab Al-Zarqawi, in a November 2005 suicide bombing that killed two Americans in Amman, Jordan); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 150 (D.D.C. 2011) (holding that the governments of both Iran and Sudan provided material support to terrorists, specifically for the Al-Qaeda bombings of the U.S. embassies in Lebanon, Kenya, and Tanzania in the 1980s and 1990s).

¹⁰ See *Rubin III*, 830 F.3d at 474 (holding that plaintiffs were unable to recover damages from Iran because the property in question did not fit within an exception to foreign immunity). This is not the first or only case where victims of terror have been denied in their quest to receive compensation from a foreign government. See, e.g., *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 98–99 (D.D.C. 2002) (providing another example of such a denial). In 2002, a district court in Washington, D.C. found that the plaintiffs did not establish a sufficient connection between the government of Iran and the individuals who murdered Yaron and Efrat Ungar in Israel. *Id.* at 99. The court found that because Iran did not provide support for the specific attack at issue, the estate of Mr. and Mrs. Ungar could not sue the government of Iran to pay for damages sustained in the murders. *Id.* at 93, 99–100. Even when a U.S. court finds that a country is a state sponsor of terror and provides a judgment in favor of American plaintiffs—like in *Rubin*—it is difficult to make the offending country pay its debts. See, e.g., Joseph A. Slobodzian, *Justice Arrives—34 Years After Beirut Embassy Bombing*, INQUIRER (Phila.), (Apr. 17, 2017), <http://www.philly.com/philly/news/crime/Justice-arrives-34-years-after-Beirut-embassy-bombing.html> [<https://perma.cc/Q68D-WVXM>] (providing an example of Iran refusing to compensate victims of Iranian-sponsored terrorist attacks).

¹¹ See, e.g., Slobodzian, *supra* note 10 (reporting that victims of the U.S. embassy bombing in Beirut, Lebanon waited over thirty years to receive compensation for their injuries, despite receiving a judgment from a U.S. court).

¹² See, e.g., *Rubin v. Islamic Republic of Iran (Rubin IV)*, 138 S. Ct. 816, 821 (2018) (granting partial writ of certiorari to settle a circuit split regarding key provisions of the Foreign Sovereign Immunities Act (FSIA)); see Edith Bradley, *My Brother and Father Were Killed by Terrorists. Trump's Sudan Deal Just Betrayed Us*, POLITICO (Oct. 17, 2017) <https://www.politico.com/agenda/story/2017/10/12/trump-sudan-deal-betrays-terrorism-victims-000548> [<https://perma.cc/H3EV-XK86>] (describing how the Trump Administration failed to use leverage against the Sudanese government to compel it to pay for damages suffered by American victims of Sudanese-sponsored terrorist attacks); Natalie Rodriguez, *Justice Delayed*, LAW360, 1–2 (Mar. 11 2016), <https://www.crowell.com/files/20160311-Justice-Delayed-Terrorism-Victims-Fight-For-Redress-Newberger.pdf> [<https://perma.cc/>

branch has attempted to resolve this problem with legislation like the Foreign Sovereign Immunities Act (“FSIA”) and subsequent amendments to it, including the Justice Against Sponsors of Terrorism Act (“JASTA”).¹³ Although the FSIA was intended to provide an immunity guarantee to foreign governments, Congress added exceptions for situations involving state sponsored terrorist attacks to help compensate victims.¹⁴ JASTA attempted to broaden and clarify the exception by stating that if a country is found to have generally sponsored terrorist organizations aggressive to the United States, the country directed (and is legally responsible for) the organization’s specific actions against the United States when an attack occurs on U.S. soil.¹⁵ The ambiguous language of the FSIA and its subsequent amendments, however, have undermined Congress’s attempts to create a fair and navigable process for all U.S. victims of terror and their families to follow.¹⁶

Similarly, the executive branch has had limited success using diplomatic negotiation to obtain compensation for families and has been reluctant to take harder stances for fear of retaliation from other countries.¹⁷ Congress has also

S22B-WE32] (documenting the difficulties and setbacks faced by victims of terror in their attempts to receive compensation).

¹³ See Haley Claxton, Comment, *Indiana Jones and the Foreign Sovereign Immunities Act (FSIA): Interpreting FSIA’s State Sponsored Terror Exception*, 66 U. KAN. L. REV. 181, 183–84 (2017) (describing amendments to FSIA).

¹⁴ H.R. REP. NO. 110-477, at 1001 (2007) (Conf. Rep.); Claxton, *supra* note 13 at 188–89; *see infra* note 65 (describing the full legislative history of the FSIA).

¹⁵ Press Release, Office of Congressman Jerrold Nadler, Reps. Lungren and Nadler Introduce Bill to Hold Foreign Sponsors of Terrorism Accountable (June 8, 2012), <https://nadler.house.gov/press-release/rep-lungren-and-nadler-introduce-bill-to-hold-foreign-sponsors-terrorism-accountable> [<https://perma.cc/T9VN-5XHE>] [hereinafter Nadler]; Ingrid Wuerth, *Justice Against Sponsors of Terrorism Act: Initial Analysis*, LAW FARE BLOG (Sept. 29, 2016) <https://www.lawfareblog.com/justice-against-sponsors-terrorism-act-initial-analysis> [<https://perma.cc/WAA6-HM4M>]. For example, government officials in Saudi Arabia have close connections with organizations linked to terrorist groups. Nadler, *supra*. Even lacking direct proof linking the Saudi government to specific attacks on Americans, like the 9/11 attacks, these general connections would be enough to allow U.S. citizens to sue the Saudi government for material support of a terror attack. *Id.*

¹⁶ See 28 U.S.C. § 1610 (2012) (detailing two different exceptions to foreign sovereign immunity without explicit language explaining how they relate to one another); *Rubin III*, 830 F.3d at 487 (contradicting prior precedent and another circuit court’s decision about the same statutory language).

¹⁷ See David A. Graham, *Why Obama Vetoes the 9/11 Lawsuit Bill*, THE ATLANTIC (Sept. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/09/obama-veto-911-saudi-arabia/501491/> [<https://perma.cc/HWF9-2XBD>] (explaining that President Obama vetoed a bill that would have allowed American victims of the 9/11 attacks to sue the Saudi Arabian government because it would have put American officials abroad at risk); Kirit Radhia & Maddy Sauer, *Pan Am 103 Families Finally Compensated*, ABC NEWS (Oct. 31, 2008, 4:51 PM), <http://abcnews.go.com/Blotter/story?id=6158491> [<https://perma.cc/TP8Z-7PF8>] (reporting on the American government negotiating compensation for the victims of the Lockerbie plane bombing with the Libyan government in exchange for the return of normalized diplomatic relations). President Obama vetoed the Justice Against Sponsors of Terrorism Act (“JASTA”), but it was overridden by Congress. Karoun Demirjian & David Nakamura, *White House Accuses Congress of ‘Buyer’s Remorse’ on 9/11 Bill*, WASH. POST (Sept. 29, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/09/29/republican-leaders-say-911->

set up common funds for victims with mixed results.¹⁸ Finally, the courts have been charged with determining how to hold foreign governments liable, which has resulted in confusing and contradictory results, as seen in the circuit split between the United States Court of Appeals for the Sixth and Ninth Circuits.¹⁹

By bringing their case to the United States Supreme Court, the victims of the Ben Yehuda bombings provided the Court with an opportunity to create an effective recovery mechanism for U.S. victims of state sponsored terrorism by clarifying confusing and ambiguous legislation.²⁰ Such a result would have obviated the need for executive branch officers to negotiate with adversarial countries.²¹ It also would have lessened the challenges the legislative branch

measure-may-need-to-be-revisited-after-elections/?utm_term=.2952ff5717de [https://perma.cc/S8Y6-VYM6]. The President vetoed the bill because of two main concerns. Graham, *supra* note 17. First, the administration was concerned that legislation making it easier for citizens to sue foreign governments would take control of how the U.S. treats countries that support terrorist attacks away from national security experts and give it to lesser informed individuals and courts. *Id.* Second, JASTA had the potential to have major consequences for the international reciprocity of sovereign immunity. *Id.* If foreign sovereign immunity is threatened in the United States, there is not much stopping other countries from coming up with their own rules and treating Americans living abroad however they see fit. See Demirjian & Nakamura, *supra*. (reporting on lawmakers' concerns that U.S. diplomats and service members could face litigation abroad). Ironically, this concern was articulated by congressional leaders just days after Congress overrode President Obama's veto. *Id.* Republican congressional leaders expressed this concern and blamed the Obama White House for failing to bring this danger to their attention, but only after both the Senate and House overrode the President's veto. *Id.*

¹⁸ See, e.g., Rodriguez, *supra* note 12, at 6 (describing the dissatisfaction some individuals felt about the 9/11 victims fund claims process). These kinds of funds have pitted victim against victim in their efforts to claim as much compensation as possible from a limited supply of funds. See *id.* at 5–6 (providing an example of one of these funds and the consequences of how it was structured). This infighting occurred when Congress tried to compensate victims of 9/11 attacks but also happened when the United States normalized relations with Libya and negotiated compensation for the victims of UTA Flight 772—otherwise known as Lockerbie II—a plane that went down in the Niger desert due to a suitcase bomb. *Id.*; Kimberly Kindy, *Families of Americans Killed in 1989 Bombing See Victory Over Libya Nullified*, WASH. POST (Dec. 23, 2008), http://www.cicte.oas.org/rev/en/about/News/2008/CICTE%20News2_2008_4.pdf [https://perma.cc/4MGU-KUGF].

¹⁹ Compare *Rubin III*, 830 F.3d at 487 (holding acts of state sponsored terror do not expose all foreign owned property located in America to attachment and that foreign-held property is used for “commercial use” only if the foreign actor is the party commercially using the property in question), with *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 965 (9th Cir. 2016) (holding that any foreign owned property located in America is eligible to be attached if the owner is a country that has been found to be a state sponsor of terror, regardless of how the property is used), *abrogated by Rubin IV*, 138 S. Ct. 816 (2018).

²⁰ See Petition for a Writ of Certiorari at 9, *Rubin III*, 830 F.3d 470 (No. 16-534) (arguing that ruling in favor of the plaintiffs would provide relief from the prolonged, painful, and often futile attempts to exact justice that has plagued victims of terror before § 1610(g) was enacted); see also *Rubin III*, 830 F.3d at 487 (contradicting prior precedent and another circuit court's interpretation of the same statutory language).

²¹ See Jonathan Broder, *Exclusive: U.S. Taxpayers, Not Tehran, Compensated Victims of Iranian Attacks Against Americans*, NEWSWEEK (Feb. 5, 2018, 4:25 PM), <http://www.newsweek.com/iran-nuclear-deal-terrorism-victims-families-stephen-flatow-barack-obama-418770> [https://perma.cc/BK7B-AA6J] (explaining that American victims of Iranian-sponsored terror attacks were paid by U.S. taxpayers rather than the Iranian government, contrary to promises by the Clinton Administration); Gar-

faces when it creates limited common funds that pit victim against victim and the judicial branch struggles with when it interprets confusing and vague legislation.²² Unfortunately, in February 2018 the United States Supreme Court in *Rubin v. Islamic Republic of Iran (Rubin IV)* ruled against the victims in a unanimous decision that closed off one of the few remaining opportunities to recover the damages they are owed.²³

The *Rubin* plaintiffs asked the Court to clarify the language in the FSIA by allowing victims of terror to seek an attachment on foreign-owned property in the United States, whether such property is used for commercial activity.²⁴ The ambiguous statutory language created competing interpretations of applicable property under the state sponsored terrorism exemption, and the *Rubin* plaintiffs believed the Court should have resolved the ambiguity in a way that produced equitable results for victims.²⁵ Rather than limiting attachable property to property used for commercial activity, the Court should have ruled in favor of the plaintiffs in *Rubin IV* and expanded the scope of property eligible for attachment because of the legislative intent behind disputed portions of the FSIA, because of the statute's plain language, and to ensure adequate recourse to the victims of state sponsored terrorism.²⁶

Part I of this note describes the legislative history of the laws meant to compensate victims of terror, provides examples of how terror victims in the past have (or have not) been compensated for their injuries, details the circuit split at issue in *Rubin IV*, and explains the United States Supreme Court's ultimate ruling.²⁷ Part II discusses the dilemma facing victims of terror in more detail by laying out the legislative, diplomatic, and judicial obstacles between plaintiffs and their compensation.²⁸ Finally, Part III argues why the Supreme

diner Harris, *Trump Administration Formally Lifts Sanctions Against Sudan*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-sanctions-sudan.html> [<https://perma.cc/9MU2-E85N>] (describing a diplomatic agreement between the United States and Sudan which lifted economic sanctions without securing assurances that the Sudanese government would pay for damages to U.S. victims from Sudanese-sponsored terror attacks).

²² See *Gates v. Syrian Arab Republic*, 755 F.3d 568, 575 (7th Cir. 2014) (detailing two groups of U.S. victims of Syrian-sponsored terror attacks suing each other for first access to funds designated for terror-related judgments), *overruled by Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018); Rodriguez, *supra* note 12, at 1–10 (describing dissatisfaction among U.S. victims of terror who are often forced to compete for the same finite pool of money).

²³ *Rubin IV*, 138 S. Ct. at 816, 820.

²⁴ See Petitioner's Brief at 4, *Rubin IV*, 138 S. Ct. 816, (No. 16-534), 2017 WL 3913770, at *4. (arguing 28 U.S.C. § 1610(g) applied to all property owned by a foreign state sponsor of terrorism or one of the state's agents or instrumentalities).

²⁵ *Id.*

²⁶ *Id.* at 24–61.

²⁷ See *infra* notes 30–113 and accompanying text.

²⁸ See *infra* notes 114–175 and accompanying text.

Court should have ruled in favor of the *Rubin* plaintiffs and discusses the ruling's potential effect on future cases and ancillary parties.²⁹

I. LEGAL AND HISTORICAL BACKGROUND OF COMPENSATION FOR VICTIMS OF TERROR AND THEIR FAMILIES

Though the U.S. government has attempted to provide a path for American victims of terror attacks to receive compensation for their injuries, and has widespread support to do so, actually creating a workable solution has proven to be nearly impossible.³⁰ Subsection A begins with an overview of foreign sovereign immunity.³¹ Subsection B describes the Foreign Sovereign Immunity Act (FSIA).³² Subsection C outlines the most recent amendment to the FSIA, the Justice Against Sponsors of Terrorism Act (JASTA).³³ Subsection D provides examples of how past victims of terror attacks have received compensation.³⁴ Subsection E provides the factual and legal background of *Rubin v. Islamic Republic of Iran* (*Rubin IV*) and explains the circuit split between *Rubin v. Islamic Republic of Iran* (*Rubin III*) and *Bennett v. Islamic Republic of Iran* that spurred the Supreme Court to grant *certiorari* for this case.³⁵ Finally, Subsection F discusses the Court's ruling in *Rubin IV*.³⁶

A. Explanation of the Foreign Sovereign Immunity Doctrine

Foreign sovereign immunity protects foreign governments from being sued in U.S. courts.³⁷ The United States followed an "absolute theory" of foreign sovereign immunity from the late nineteenth century to the middle of the twentieth century.³⁸ The "absolute theory" provided international countries

²⁹ See *infra* notes 176–219 and accompanying text.

³⁰ See Ilana Arnowitz Drescher, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL. 791, 796–806 (2012) (arguing current laws do not effectively compensate victims and detailing the legislative history of attempts to do so); Seung Min Kim, *Congress Hands Obama First Veto Override*, POLITICO (Sept. 26, 2016, 12:32 PM), <https://www.politico.com/story/2016/09/senate-jasta-228841> [<https://perma.cc/6XYV-H4N5>] (describing how the most recent legislation attempting to provide compensation enjoyed broad support in both houses of Congress).

³¹ See *infra* notes 37–47 and accompanying text.

³² See *infra* notes 48–64 and accompanying text.

³³ See *infra* notes 65–69 and accompanying text.

³⁴ See *infra* notes 70–83 and accompanying text.

³⁵ See *infra* notes 84–102 and accompanying text.

³⁶ See *infra* notes 103–113 and accompanying text.

³⁷ 28 U.S.C. § 1604 (2012); Dan Cahill, *The Justice Against Sponsors of Terrorism Act: An Infringement on Executive Power*, 58 B.C. L. REV. 1699, 1710 (2017).

³⁸ Ethan J. Early, Note, *Flatow v. Islamic Republic of Iran and the Foreign Sovereign Immunities Act: Is Peace of Mind Enough?*, 14 CONN. J. INT'L L. 203, 205 (1999); Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887, 889 (2002). Foreign sovereign immunity has been recognized by the Supreme

with broad immunity from the U.S. judicial system, subject to a few exceptions.³⁹ Foreign sovereign immunity was a “matter of grace and comity on the part of the United States” and was largely left to the Executive Branch.⁴⁰ Even if a U.S. court granted itself jurisdiction over a foreign sovereign, and the plaintiff received a judgment on their claim, the United States used to provide absolute immunity over any execution of a judgment, thereby making the judgment itself effectively meaningless.⁴¹ This commitment to foreign sovereign immunity helped to keep foreign relations in status quo because keeping foreign assets safe domestically ensured protection for U.S. assets abroad.⁴²

At the urging of the State Department, this policy changed in 1952, when the government granted “restrictive” immunity to foreign states by providing jurisdictional immunity for actions from a state’s “public acts” but not for “strictly commercial” actions.⁴³ With the new flexibility, foreign states could be sued and compelled to pay judgments if their offending actions could be categorized as “commercial.”⁴⁴ This theory narrowed the scope of sovereign immunity and allowed plaintiffs to receive a judgment against a foreign gov-

Court for many years. *See, e.g., Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 134 (1812) (providing an early example of the “absolute theory”). Early cases of absolute immunity largely centered around foreign diplomats and foreign public ships. S. Jason Baletsa, Comment, *The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act*, 148 U. PA. L. REV. 1247, 1251–52 (2000). In *Schooner Exchange v. McFaddon*, the French navy captured a ship owned by two Americans who sued to regain custody after the ship docked in a U.S. naval yard. 11 U.S. at 117. Chief Justice John Marshall explained the rationale for sovereign immunity when he observed that the world was full of equally free and independent countries and imputed the immunity enjoyed by a nation as a whole onto the individual foreign sovereign who enters a different country with different laws. *Id.* at 137. Without this guarantee, it would be difficult for anyone to go anywhere with any assurance of fair treatment. *See id.* (holding that individuals are only bound by the laws of their home, rather than by the laws of the new country because one country’s laws cannot compel a different country to act differently). Because of the foreign sovereign immunity’s importance, Chief Justice Marshall found that the French navy was immune from jurisdiction, and he dismissed the case. *Id.* at 147.

³⁹ *See Drescher, supra* note 30, at 798 (citing JOSEPH M. SWEENEY, U.S. DEP’T OF STATE, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 20–21 (1963) (stating that the U.S. government did not grant absolute immunity to foreign sovereigns when the litigation involved foreign-owned immovable property or an estate that was administered locally)).

⁴⁰ *Rubin v. Islamic Republic of Iran (Rubin III)*, 830 F.3d 470, 476 (7th Cir. 2016) (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)), *aff’d*, 138 S. Ct. 816 (2018). For this reason, the judiciary followed the guidance of the executive to determine when American courts had jurisdiction over foreign sovereigns and their agents. *Id.* The plaintiff would only receive the judgment if the foreign sovereign voluntarily paid the debt. *Id.* at 477.

⁴¹ *See Rubin III*, 830 F.3d at 476 (citing *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 749 (7th Cir. 2007) (arguing that the victims depend on voluntary payments by the foreign governments)).

⁴² *See Drescher, supra* note 30, at 798 (citing Chief Justice Marshall, who justified sovereign immunity’s importance by emphasizing each government’s equality and independence).

⁴³ *Rubin III*, 830 F.3d at 477.

⁴⁴ *See id.* (detailing the differences between the absolute theory of immunity and the restrictive theory solidified through the FSIA).

ernment, but it did not go so far as to compel foreign defendants to forfeit property in many instances.⁴⁵ Furthermore, the U.S. government occasionally circumvented the rules and decided that certain foreign sovereign defendants should receive immunity when that party would not have otherwise been eligible for such a privilege.⁴⁶ Congress officially codified restrictive sovereign immunity with the passage of the FSIA in 1976.⁴⁷

B. Explanation of the Foreign Sovereign Immunities Act

The FSIA provides a wide spectrum of legal guidelines for all civil actions against foreign entities.⁴⁸ The legislation's purpose is to uphold the foreign sovereign immunity doctrine by broadly shielding foreign governments and other bodies from being sued in U.S. courts.⁴⁹ The legislation includes a section on jurisdictional immunity, providing guidelines for when U.S. courts can hear a case regarding foreign sovereign immunity.⁵⁰ There is also a section on execution immunity, which instructs U.S. courts on whether they can compel a foreign sovereign to pay damages owed to a plaintiff.⁵¹ The language in 28 U.S.C. § 1605A is especially relevant for the purposes of compensating victims of terror because it creates a specific immunity exception for foreign states found liable for sponsoring terrorist attacks.⁵² In other words, this sec-

⁴⁵ See *id.* (describing foreign sovereign immunity and exceptions under the FSIA).

⁴⁶ *Id.* (citing *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014)). This confusion largely stemmed from a letter written in 1952 by Jack Tate, the U.S. Department of State's legal counsel, to the Attorney General. Drescher, *supra* note 30, at 798, (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), in 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]). Though the letter recommended the distinction between public and private acts, it did not provide guidance on distinguishing between these different kinds of acts. Drescher, *supra* note 30, at 798. Instead, the State Department implemented a case by case review method that did not provide consistent results. *Id.* at 799.

⁴⁷ 28 U.S.C. § 1602 (2012); *Rubin III*, 830 F.3d at 477.

⁴⁸ *Verlinden*, 461 U.S. at 488; see 28 U.S.C. § 1602 (detailing when foreign sovereign-owned property is eligible for attachment in a variety of circumstances). According to the Supreme Court's decision in *Verlinden*, the statute governs all immunity claims against foreign states in all civil contexts. 461 U.S. at 488.

⁴⁹ 28 U.S.C. § 1602. Congress intended for the FSIA to justly protect both the rights of both foreign actors and domestic litigants. *Id.*

⁵⁰ § 1604.

⁵¹ § 1609.

⁵² See § 1605A (discussing when foreign countries are liable for damages sustained by victims of terrorist attacks). According to the statute, the *Rubin* plaintiffs must prove the following four elements to establish grounds for liability: (1) "the foreign country was designated a state sponsor of terrorism at the time [of] the act"; (2) the victim was a U.S. national; (3) the claimant afforded the foreign state a reasonable opportunity to arbitrate the claim; and (4) the victim sought monetary damages "for personal injury or death that was caused by an act of torture, extrajudicial killing . . . or the provision of material support or resources for such an act, if such an act . . . is engaged in by an official, employee, or agent . . ." of a foreign country. § 1605A(a)(1)-(c); see *Rubin III*, 830 F.3d at 478 (describing that the plaintiffs are suing under section 1605A).

tion strips jurisdictional immunity from a foreign state if it is found to be a "state sponsor of terrorism" of the act in question.⁵³

There are, however, still restrictions on how foreign states are compelled to pay judgments even if they are found to be a state sponsor of terrorism.⁵⁴ Section 1609 states that property of a foreign sovereign is not eligible for attachment unless it also fits into one of the exceptions found in §§ 1610 and 1611 of the act.⁵⁵ Some courts, such as the United States Court of Appeals for the Seventh Circuit, have interpreted these sections as allowing attachment of foreign-owned property only if it meets one of the exceptions in § 1610 (a) or (b), even if it also meets a different exception within the statute.⁵⁶

Specific exceptions to the immunity of foreign sovereign-owned property from attachment or execution are contained in 28 U.S.C. § 1610.⁵⁷ The most

⁵³ § 1605A(a)(2)(A)(i)(I). The FSIA was created by Congress to clean up the mess left behind by the Tate Letter and today provides the "sole basis" for obtaining jurisdiction over a foreign entity in U.S. courts. See Joshua Dermott et al., *The Foreign Sovereign Immunities Act (FSIA): 2008 Year in Review*, CROWELL & MORING (2008), https://www.crowell.com/documents/Foreign-Sovereign-Immunities-Act-FSIA_08-Review.pdf [<https://perma.cc/RX66-47XN>] (discussing how the FSIA was meant to clarify the ambiguity in the Tate Letter); Tate Letter, *supra* note 46. Prior to the FSIA, foreign states would present their claims of immunity to the U.S. Department of State's Office of the Legal Advisor in informal and quasi-judicial hearings. Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?*, 16 BERKELEY J. INT'L L. 71, 72 (1998). To make matters worse, courts had different views of whether the results of these *ad hoc* hearings were legally binding. *Id.* The hope was to create a system that was more black and white and decided by the judiciary rather than through unpredictable and uncertain hearings involving external diplomatic pressures on the OLA's decision. *Id.* at 72–73. President Ford momentarily vetoed the FSIA when it was first brought to his desk because he was presented with two versions of the same bill after a miscommunication between the House and the Senate. Foreign Sovereign Immunities Act of 1976, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 23, 1976); Veto of the Foreign Immunities Bill, 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976). Just a day later, the matter was resolved and President Ford signed the bill into law. Foreign Sovereign Immunities Act of 1976, *supra*.

⁵⁴ § 1609.

⁵⁵ *Id.* For a complete list of the exceptions surrounding the commercial use of foreign-owned property, refer to 28 U.S.C. § 1610. Section 1611 describes carve outs of § 1610. In other words, even if the property in question was used for commercial use, and could fit into an exception listed in § 1610, § 1611 details the situations where the property would still be immune from attachment.

⁵⁶ *Rubin III*, 830 F.3d at 487. Meanwhile, the Ninth Circuit reads the state sponsor exception as independent of any other exception in the FSIA. *Bennett*, 825 F.3d at 959, 965. This will be discussed further in coming sections. Compare *Rubin III*, 830 F.3d at 487 (holding that state sponsor-owned property located in the United States is eligible for attachment only if the foreign state is using the property for a commercial purpose), with *Bennett*, 799 F.3d at 965 (holding that any property located in the United States owned by a foreign state sponsor of terror is eligible for attachment).

⁵⁷ § 1610. Notably, immunity can only be removed if the property in question was being used for a "commercial activity" as defined by the statute. *Id.* If the property was only for private use, then it cannot be touched by an American court, regardless of other exceptions within § 1610 that may apply to the foreign state that owns the property. See *id.* (detailing when foreign state-owned property may be immunized from attachment when a claimant tries to execute a judgment from a U.S. court); *Rubin III*, 830 F.3d at 477 (describing commercial activity as an important exception to foreign sovereign immunity). Some of the more mundane exceptions in § 1610 include when a foreign state waives its

notable exceptions for the purposes of the *Rubin* plaintiffs fall in § 1610(a), (b) and (g), all of which can apply to execution proceedings obtained under the terrorism exception of § 1605A.⁵⁸ Sections 1610(a) and (b) specify that property owned by a foreign sovereign, its instrumentality, or its agent that is held in the United States may be eligible for attachment or execution in a variety of judgments if it is “used for a commercial activity in the United States.”⁵⁹

Meanwhile, § 1610(g) states that, when a judgment is specifically entered under § 1605A, the property of a foreign state’s instrumentality or agent can be attached to help execute the judgment.⁶⁰ This is a departure from prior court decisions, which used five factors outlined by the Supreme Court in the 1983 decision *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”) to determine if property could be attached to pay for damages sustained from a state sponsored terrorism attack.⁶¹ These factors made it difficult for plaintiffs to recover damages from these attacks because the parameters outlining eligible property were narrow.⁶² The passage of § 1610(g) changed this calculus because it specifically repealed all five of the *Bancec* factors in subsections (A)–(E).⁶³ This, however, does not mean plaintiffs are

privilege to immunity and when the property in question was used for the commercial activity that the claim is based upon. 28 U.S.C. § 1610(a)–(f).

⁵⁸ § 1610 (a)–(b), (g); see *Rubin III*, 830 F.3d at 477 (describing subsections (a) and (b) as “prominent”). In other words, § 1610(g) details how a victim of terror can obtain compensation once a defendant foreign state is found to be a state sponsor of terrorism and therefore does not have the immunity regularly conferred onto a foreign state.

⁵⁹ § 1610(a)–(b).

⁶⁰ § 1610(g).

⁶¹ *Rubin III*, 830 F.3d at 481. The five rules were as follows: how much economic control the foreign state had over the property; whether the profits of the property went to the foreign state; how much control foreign state officials had over the daily affairs of the property; whether the foreign state was the only beneficiary of the property in question; and whether establishing the property as a separate entity would have given the foreign state benefits in the U.S. court system while avoiding future obligations. *Id.* at 483. These rules were a response to the Supreme Court’s 1983 decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, which created the *Bancec* rule. 462 U.S. 611, 626–27 (1983); *Rubin III*, 830 F.3d at 481. The *Bancec* decision generally prohibited the execution of a judgment against a foreign government, except for two limited exceptions: (1) the foreign government and the instrumentality in question were alter egos; or (2) adhering to the general rule of separateness would create a fraud or injustice. 462 U.S. at 628–33.

⁶² See *Rubin IV*, 138 S. Ct. at 823 (finding that § 1610(g) did away with the *Bancec* factors, thereby making more property available to plaintiffs).

⁶³ *Rubin III*, 830 F.3d at 483. Subsections (A)–(E) effectively repeal the *Bancec* factors because property can be attached “regardless of” the five subsections that almost perfectly mirror the five *Bancec* factors. *Id.* The text of the statute is as follows:

[T]he property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment . . . regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

merely required to prove that the attack in question was state sponsored to execute their judgment.⁶⁴

C. Explanation of the Justice Against Sponsors of Terrorism Act

The FSIA has gone through numerous revisions throughout the years, most recently in September 2016 when Congress overrode a Presidential veto and passed JASTA.⁶⁵ Before the amendment, U.S. courts determined the state sponsor of terrorism exemption applied to victims of terror attacks in the United States when the state sponsor outfitted the specific attack that injured U.S. citizens.⁶⁶ JASTA widens the terrorism exception and allows for victims to sue foreign governments for generally funding terrorist organizations that affect U.S. citizens on U.S. soil, regardless of whether or not the foreign sovereign funded the specific attack.⁶⁷ According to Senators John Cornyn (R-TX) and

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

§ 1610(g)(1)(A)–(E) (emphasis added).

⁶⁴ See *Rubin IV*, 138 S. Ct. at 820 (holding § 1610(g) is not an independent exemption of foreign sovereign immunity).

⁶⁵ Kim, *supra* note 30. Section 2(b) of JASTA explicitly states Congress's intent in passing the legislation was to provide litigants with the "broadest possible basis" to get relief against foreign states that directly or indirectly have provided material support to terrorist organizations acting against the United States. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853 (2016).

⁶⁶ *Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 AM. J. INT'L L. 156, 156 (2017) (citing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 117 (2d Cir. 2013)).

⁶⁷ See Wuerth, *supra* note 15 (explaining how JASTA creates a new avenue to sue foreign governments for a terrorist attack in the United States and for a specific action of the foreign government, no matter where the foreign state's tortious actions occurred). The FSIA was first passed in 1976. *Rubin v. Islamic Republic of Iran (Rubin I)*, 637 F.3d 783, 792 (7th Cir. 2011), *as corrected* (Apr. 1, 2011). The original foreign sovereign exemption regarding terrorism was introduced in 1996 through the Antiterrorism and Effective Death Penalty Act, which amended the FSIA by including § 1605(a)(7). Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (codified as amended at 28 U.S.C. § 1605(a)(7) (1996)); Petitioner's Brief, *supra* note 24, at 10. The relevant language eliminated foreign sovereignty in situations where victims of terror attacks sought monetary damages from a foreign state that either executed the act or provided material support for it. *Rubin I*, 637 F.3d at 794 (citing 28 U.S.C. § 1605(a)(7) (1996)). This exemption was repealed in 2008 through the National Defense Authorization Act ("NDAA") and replaced by 28 U.S.C. § 1605(A). National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (codified as amended at 28 U.S.C. § 1605(A)); Petitioner's Brief, *supra* note 24, at 10, 15. It restricted the terrorism exception to only acts made by State Department-designated "state sponsors of terrorism." Petitioner's Brief, *supra* note 24, at 10. Section 1605(A) was not entirely restrictive, however, as it also allowed plaintiffs to receive punitive damages. 28 U.S.C. § 1605(A); Petitioner's Brief, *supra* note 24, at 16. The NDAA also contained changes to § 1610(g), which is the statute centrally at issue in this case. National Defense Authorization Act § 1083; Petitioner's Brief,

Chuck Schumer (D-NY), the bill attempted to provide a clear path forward for victims of terror attacks and their families to receive compensation by opening access to previously excluded foreign sovereign properties.⁶⁸ This helped alleviate obstacles facing plaintiffs but did not address the circuit split at issue in *Rubin IV* because the injuries they sustained happened in attacks that occurred outside of the United States.⁶⁹

D. Previous Methods of Providing Compensation to Victims of Terror Attacks

The plaintiffs in *Rubin IV* are not the first group of victims who have struggled to get relief for their injuries, though certain victims have been more successful than others.⁷⁰ Section D details the most common strategies that have been used to receive compensation.⁷¹

supra note 24 at 16. Congress also passed the Terrorism Risk Insurance Act in 2002 which allowed victims of terror to execute judgments against any seized or frozen assets of terrorist parties. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(d)(2)(A), 116 Stat. 2337 (2002); Petitioner's Brief, *supra* note 24, at 14.

⁶⁸ See Kim, *supra* note 30 (discussing how the legislation allowed victims of the 9/11 attacks to sue the Saudi Arabian government). Those who spoke in favor of the bill, including Senators Cornyn and Schumer, referenced the families of 9/11 victims specifically. *Id.* JASTA applies, however, to all victims of terror attacks, not just casualties of 9/11. *Id.* The actual impact of JASTA might not be as large as its supporters hoped. Wuerth, *supra* note 15. According to Professor Ingrid Wuerth, the limited ways in which a victim of terror can execute a judgment against a state sponsor of terror may not apply to plaintiffs seeking to utilize the new rules outlined in JASTA. *Id.* The new legislation allows plaintiffs to sue other countries for a wider variety of actions, but it fails to detail how plaintiffs should go about executing judgments. *Id.* This leaves new plaintiffs with the same problem facing the *Rubin* plaintiffs. See 830 F.3d at 487 (finding a lack of eligible property to attach).

⁶⁹ See Justice Against Sponsors of Terrorism Act § 2(b) (failing to address whether state sponsorship of terrorism is a standalone exception to foreign sovereign immunity when American victims attempt to recover damages from terrorist attacks); *Rubin IV*, 138 S. Ct. at 820, 821, n.3 (discussing the plaintiffs' injuries suffered in Israel and when courts strip foreign sovereign immunity); Wuerth, *supra* note 15 (describing how JASTA provides gives terror victims more opportunities to sue foreign governments).

⁷⁰ See *Rubin IV*, 138 S. Ct. at 821 (discussing prior attempts by victims of terrorist attacks to receive compensation for their injuries); Dan Levine, *In Anti-Terrorism Lawsuits, Verdicts Are Just the First Battle*, REUTERS, (Apr. 29, 2015), <https://www.reuters.com/article/us-attacks-litigation-victims-insight/in-anti-terrorism-lawsuits-verdicts-are-just-the-first-battle-idUSKBN0NK0A720150429> [<https://perma.cc/KWF5-LXUZ>] (describing difficulties faced by victims of terror after receiving an initial judgment); *Libya Pays \$1.5 Billion to Settle Terrorism Claims*, CNN (Nov. 21, 2008), <https://web.archive.org/web/20180916045116/http://www.cnn.com/2008/WORLD/africa/10/31/libya.payment/index.html> [<https://perma.cc/9JT8-C2WX>] [hereinafter *Libya Pays \$1.5 Billion*] (highlighting victims of the Lockerbie bombing receiving compensation decades after the initial attack); Joseph A. Slobodzian, *supra* note 10 (reporting on the struggles victims of various terror attacks experienced when attempting to receive compensation).

⁷¹ See Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 404, 129 Stat. 2242, 3007-18 (providing compensation to victims through legislation that created a special fund after courts awarded judgments); *Libya Pays \$1.5 Billion*, *supra* note 70. (reporting on victims who received compensation through a diplomatic settlement).

1. Diplomatic Settlements

On December 21, 1988, Pan American flight 103 exploded over the small town of Lockerbie, Scotland after terrorists associated with the Libyan government detonated a bomb on board.⁷² The families of the 189 U.S. victims filed suit seeking financial compensation for the loss of their family members.⁷³ Rather than going through the court system, however, the victims' families ended up receiving money through a diplomatic agreement between the U.S. and Libyan governments.⁷⁴ The settlement provided the families with five hundred million dollars, which was part of a larger one and a half billion dollar settlement paid by the Libyan government as compensation for various terrorist attacks perpetrated with Libya's assistance.⁷⁵

2. Court Rulings and Legislative Changes

Over the decades, many U.S. victims of terror attacks and their families have received settlements against foreign states, including Iran.⁷⁶ For example, one family of a victim of the 1986 Beirut embassy bombing received a judgment against Iran for thirty million dollars in 2003 after suing under the FSIA.⁷⁷ Despite the court's decision, there was no real way to collect the money.⁷⁸ Iran did not have enough eligible assets in the U.S. that could be seized to help satisfy the judgment.⁷⁹ To help address this issue, Congress passed an omnibus spending bill called the Consolidated Appropriations Act, 2016.⁸⁰ The

⁷² *Terrorist Bombing of Pan Am Flight 103*, C.I.A. (July 23, 2012, 9:08 AM), <https://www.cia.gov/about-cia/cia-museum/experience-the-collection/text-version/stories/terrorist-bombing-of-pan-am-flight-103.html> [<http://perma.cc/K32Z-M933>]. Two hundred and seventy people died in the attack, including all 259 passengers and crew on board the flight and eleven pedestrians on the ground in Scotland. *Pan Am 103 Bombing: A Look Back*, CBS NEWS (last visited Jan. 29, 2018), <https://www.cbsnews.com/pictures/pan-am-103-bombing-a-look-back/> [<https://perma.cc/V6KX-YXSN>].

⁷³ *Libya Pays \$1.5 Billion*, *supra* note 70. The agreement also compensated families of victims who died in the bombing of La Belle disco in Berlin, Germany in 1986. *Id.* In addition, the U.S. government paid Libyans \$300 million in compensation for a 1988 American airstrike that killed dozens of civilians. *Id.* The settlement also had a larger diplomatic purpose, as the Americans relieved Libya of any further legal liability surrounding Libyan-financed terror attacks against Americans and helped establish a path towards greater U.S. involvement in the country. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Slobodzian, *supra* note 10.

⁷⁷ *Id.* Albert Votaw was a housing officer with the State Department's Agency for International Development and was one of the sixty-three people killed when a car bomb exploded in the U.S. Embassy in Beirut. *Id.* Votaw's surviving relatives were part of a group of fifty-five people who jointly sued the Iranian government for their involvement in various terror attacks. *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.* (reporting on plaintiffs suing to expand subsection (g) to attach the Persepolis Collection). American courts awarded judgments against Iran worth \$46 billion by 2015 for their involvement in terror attacks on American citizens. *Id.*

⁸⁰ *See* Consolidated Appropriations Act § 404 (creating a compensation fund for victims of terror).

bill in part created a fund of over a billion dollars derived from a court settlement with a French bank that admitted to helping numerous countries evade sanctions, including Iran and other state sponsors of terrorism.⁸¹ Both methods of receiving compensation—through diplomatic processes and through a combination of the courts and new legislation—proved to be at least moderately effective for the plaintiffs involved.⁸² Yet, these strategies did not work for the Ben Yehuda bombing victims.⁸³

E. Background of Rubin v. Islamic Republic of Iran (Rubin IV)

Many of the U.S. victims of the 1997 Ben Yehuda attack were severely injured and have been fighting for years to receive compensation from Iran.⁸⁴ The plaintiffs first filed a suit under the FSIA in 2001 in a district court of the

⁸¹ *Id.*; Joseph Ax et al., *U.S. Imposes Record Fine on BNP in Sanctions Warning to Banks*, REUTERS, (June 10, 2014), <https://www.reuters.com/article/us-bnp-paribas-settlement/u-s-imposes-record-fine-on-bnp-in-sanctions-warning-to-banks-idUSKBN0F52HA20140701> [<https://perma.cc/4ALA-8DQT>]; Slobodzian, *supra* note 10; John Bellinger, *Omnibus Bill Creates One Billion Dollar Fund for Victims of Terrorism (and Allows up to \$250 Million to Go to Their Attorneys)*, LAW FARE BLOG (Dec. 28, 2015, 12:04 PM), <https://www.lawfareblog.com/omnibus-bill-creates-one-billion-dollar-fund-victims-terrorism-and-allows-250-million-go-their> [<https://perma.cc/NP8Y-8QV9>]. There were, however, strings attached to the money. Slobodzian, *supra* note 10. No individual could receive more than \$20 million and no family could receive more than \$35 million. *Id.* Each claimant was also to receive 13.5% of the original settlement provided by the courts. *Id.* There are currently only four officially recognized state sponsors of terrorism: Iran, Syria, North Korea, and Sudan. Adam Taylor, *North Korea's On-Again-Off-Again Status as a State Sponsor of Terrorism*, WASH. POST, (Nov. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/11/20/north-koreas-on-again-off-again-status-as-a-state-sponsor-of-terrorism/?utm_term=.c5d0e42f028a [<https://perma.cc/ZBT2-6NDT>].

⁸² *See Libya Pays \$1.5 Billion*, *supra* note 70 (describing how victims received compensation through a diplomatic settlement between the U.S. and Libyan governments); Slobodzian, *supra* note 10 (reporting on a group of victims who received compensation from a fund created by Congress); *supra* notes 73, 81 and accompanying text (describing success with diplomacy, the court system, and legislation).

⁸³ *See Rubin III*, 830 F.3d at 473–74 (petitioning the Supreme Court because there were no other opportunities for victims of the Ben Yehuda bombing to receive compensation from the court's holding regarding Iran's liability).

⁸⁴ *See id.* at 473 (discussing the \$71.5 million judgment awarded to the victims); Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 261 (D.D.C. 2003) (describing how the *Rubin* plaintiffs first filed suit in 2000). Diana Campuzano was rushed to a nearby hospital with life-threatening injuries. *Campuzano*, 281 F. Supp. 2d at 263–64. She had lost hearing, was blind, badly burned, and suffered a massive skull fracture. *Id.* Avi Elishis suffered multiple lacerations and entry wounds from the bomb's shrapnel (including a perforated lung), burns, and a ruptured eardrum. *Id.* at 264–65. Gregg Salzman suffered a perforated eardrum, numerous burns, and entry wounds from shrapnel causing permanent nerve damage and chronic pain. *Id.* at 265. Jenny Rubin suffered permanent tinnitus. *Id.* Daniel Miller suffered multiple shrapnel-caused entry wounds in his legs and had a piece of glass embedded in one eye. *Id.* at 266. Abraham Mendelson suffered a partially severed ear, multiple entry wounds from shrapnel, and multiple burns throughout his body. *Id.* Stuart Hersh suffered multiple entry wounds caused by shrapnel and multiple burns. *Id.* at 266–67. Noam Rozenman had burns covering over 40% of his body and suffered more than one hundred shrapnel entry wounds. *Id.* at 267. All of these individuals also suffered severe mental and psychological trauma, manifesting in cases of Post-Traumatic Stress Disorder, depression, and severe personality changes. *Id.* at 263–67.

District of Columbia and received a judgment of over seventy-one million dollars to be paid by the government of Iran.⁸⁵ The plaintiffs have been attempting to satisfy the judgment ever since, largely through seeking attachments on Iranian properties located in the United States.⁸⁶ The Supreme Court most recently affirmed a United States Court of Appeals for the Seventh Circuit decision concerning the plaintiff's ability to attach the Persepolis Collection, a large collection of Persian artifacts held in the University of Chicago's Oriental Collection.⁸⁷ The plaintiffs tried to force the sale of this collection and keep the money that Iran owes them from the original judgment.⁸⁸

The Seventh Circuit held in 2016 that § 1610(g) of the FSIA was not a freestanding exception to foreign sovereign immunity and thus denied the *Rubin* plaintiffs their ability to raise funds by selling this collection.⁸⁹ The court decided that any foreign state-owned property that plaintiffs tried to attach under § 1610(g) as part of a state sponsor of terrorism exception needed to also meet the requirements of other parts of the statute.⁹⁰ Specifically, the property had to have been used for a "commercial activity within the United States" as specified in § 1610(a) and (b).⁹¹ The statute describes seven distinct kinds of "commercial activity" that would allow the plaintiffs to access the property in question.⁹² Because the court did not find that the Persepolis Collection was

⁸⁵ *Rubin III*, 830 F.3d at 473. The *Rubin* and *Campuzano* plaintiffs had originally filed separate suits. Alyssa N. Speichert, Note, *The Persepolis Complex: A Case for Making the Collections Process Easier Under Section 1610(g) of the Foreign Sovereign Immunities Act for Victims of Foreign State Sponsored Terrorism*, 2017 MICH. ST. L. REV. 547, 558–59. Because both suits originated from the same incident, involved many of the same defendants, and concerned similar questions of law and fact, the D.C. circuit court consolidated both claims into one. *Campuzano*, 281 F. Supp. 2d 258, 260–61.

⁸⁶ *Rubin III*, 830 F.3d at 473–74. The *Rubin* plaintiffs previously attempted to file attachments against two domestic bank accounts used by the Iranian government and a similar collection of Persian antiquities held at the Boston Museum of Fine Arts and Harvard University. *Rubin III*, 830 F.3d at 473; *Rubin v. Islamic Republic of Iran (Rubin II)*, 709 F.3d 49, 51 (1st Cir. 2013). The Boston collection included stone reliefs, sculptures, and other artifacts. *Rubin II*, 709 F.3d at 51. The United States Court of Appeals for the First Circuit ruled against the *Rubin* plaintiffs, finding the property in question ineligible under the Terrorism Risk Insurance Act of 2002 because it was not a "blocked asset." *Id.* at 58. The court did not address the scope of § 1610(g)—the question that was at issue in the most recent *Rubin* case—because plaintiffs did not bring up the argument at the district court level or in their opening brief on appeal. *Rubin III*, 830 F.3d at 487; *Rubin II*, 709 F.3d at 54.

⁸⁷ *Rubin III*, 830 F.3d at 474. The Persepolis Collection consists of roughly thirty thousand clay tablets and fragments that contain some of the oldest writings in the world. *Id.* They arrived in the United States over a sixty-year span starting in 1937. *Id.*

⁸⁸ *Id.* at 473–75, 487.

⁸⁹ *Id.* at 487.

⁹⁰ *Id.* The *Rubin* plaintiffs first had to prove they sustained damages due to a state sponsored terrorist attack under § 1605A of the FSIA. *Id.* Once a court ruled that their claim fit within § 1605A, the victims then attempted—and failed—to sue under § 1610(g) alone to execute the judgment. *Id.* The victims' claims needed to fit within § 1610(a), not just § 1610(g), to succeed. *Id.*

⁹¹ 28 U.S.C. § 1610(a)–(b).

⁹² *Id.* § 1610(a)(1)–(7).

used for any economic activity as defined in § 1610(a) and (b), it barred the plaintiffs from filing an execution or attachment on the Persepolis Collection.⁹³

This, however, created a split with a decision in the United States Court of Appeals for the Ninth Circuit.⁹⁴ The Ninth Circuit held in 2016 in *Bennett v. Islamic Republic of Iran* that victims of terror could seek attachments to property under § 1610(g) whether it met a separate § 1610 exception.⁹⁵ It did not matter whether the property in question was used for a “commercial activity” if the foreign sovereign owner had materially supported a terrorist attack under § 1605A and so fell into the § 1610(g) exception.⁹⁶ This diametrically opposite outcome led to a positive result for the victims.⁹⁷ Unlike the *Rubin* plaintiffs, the *Bennett* plaintiffs were able to access this contested property and could therefore collect at least part of the money the Iranian government owed to them for injuries they sustained due to acts of state sponsored terrorism.⁹⁸

Though the *Rubin* plaintiffs and the Iranian government had other disagreements, the Supreme Court addressed the circuit split issue.⁹⁹ If the Court found § 1610(g) to be a freestanding exception, terrorism victims and their families would have been able to seek attachment on numerous kinds of property.¹⁰⁰ The Court ruled differently, however, finding § 1610(g) entirely dependent on

⁹³ *Rubin III*, 830 F.3d at 487.

⁹⁴ *Rubin IV*, 138 S. Ct. at 821 n.3.

⁹⁵ *Bennett*, 825 F.3d at 959, 969. Four separate groups of plaintiffs in *Bennett* sued the government of Iran for damages sustained from terrorist attacks it had supported. *Id.* at 956. The attacks included a 1996 bombing of the Khobar Towers in Saudi Arabia, a 1990 mass shooting, a 2002 bombing of a cafeteria at Hebrew University in Jerusalem, and a 2001 bombing of a restaurant in Jerusalem. *Id.* The total damages awarded across all four lawsuits totaled about \$973 million. *Id.* The plaintiffs sued to attach Iranian accounts at various companies. *Id.* at 954. Two companies, Visa and Franklin, owed close to \$17 million to Bank Melli, a wholly state-owned bank that is also Iran’s largest financial institution. *Id.* at 957. The court found that the bank was an instrumentality of the Iranian government. *Id.* at 959. Therefore, the plaintiffs could attach the bank’s property held in the U.S. since their damages came from a state sponsored terrorist attack. *Id.*

⁹⁶ *Id.* at 959, 965.

⁹⁷ See *Rubin III*, 830 F.3d at 475 (holding plaintiffs could not execute their judgments); *Bennett*, 825 F.3d at 959, 969 (holding plaintiffs could execute their judgments).

⁹⁸ See *Rubin III*, 830 F.3d at 487 (holding that the plaintiffs could not sell the contested property to satisfy their judgments); *Bennett*, 825 F.3d at 959, 969 (holding that the plaintiffs could sell the contested property to satisfy a number of judgments from state sponsored terrorist attacks); *supra* note 95–97 and accompanying text (explaining how and why the *Bennett* plaintiffs received compensation).

⁹⁹ *Rubin IV*, 138 S. Ct. at 821. What constituted a commercial activity inside the United States—and if the Persepolis collection fit within that definition—was another question that the *Rubin* plaintiffs included in their initial *writ of certiorari* to the Supreme Court. Petition for a Writ of Certiorari at ii, *Rubin v. Islamic Republic of Iran (Rubin IV)*, 138 S. Ct. 816. (2018) (No. 16-534), <https://www.scotusblog.com/wp-content/uploads/2016/10/16-534-cert-petition.pdf> [<https://perma.cc/C4YR-AMXY>]. The Court, however, ruled that they would only address the circuit split regarding § 1610(g). *Rubin IV*, 138 S. Ct. at 821.

¹⁰⁰ See *Rubin IV*, 138 S. Ct. at 825 (allowing access to the Persepolis Collection would also allow access to other property not used for a commercial activity in the United States).

the rest of the statute.¹⁰¹ Therefore, the *Rubin* plaintiffs, along with many others, need to keep searching for other avenues to receive compensation.¹⁰²

F. The Supreme Court's Decision and Reasoning in Rubin v. Islamic Republic of Iran (Rubin IV)

On February 21, 2018, the United States Supreme Court held in favor of the Iranian government in *Rubin v. Islamic Republic of Iran (Rubin IV)*.¹⁰³ In an 8–0 decision, Justice Sotomayor, writing for the Court, stated § 1610(g) was not an independent exception to foreign sovereign immunity when a victim of a state sponsored terror attack, as defined in § 1605A, sought to fulfill their judgment.¹⁰⁴ After describing the Ben Yehuda bombing and the legislative history of the FSIA, the Court provided its reasoning for the opinion.¹⁰⁵

The Court began by holding the most logical reading of the statute's language results in § 1610(g)(1) limiting the scope of attachable property.¹⁰⁶ The subsection stipulates that property is subject to attachment to execute a § 1605A judgment "as provided in this section."¹⁰⁷ The Court determined that "this section" referred to § 1610 as a whole, which included the commercial activity requirement in § 1610(a) and (b).¹⁰⁸ Without any "textual markers" that segregated it from the rest of the FSIA, the justices read § 1610(g) to be dependent on the other exceptions throughout the statute.¹⁰⁹

Furthermore, the Court reasoned that any other interpretation of the statute would make other sections superfluous.¹¹⁰ It also dismissed plaintiffs' counterarguments about alternative statutory interpretation.¹¹¹ After discussing why its own interpretation of the statute would not lead to any superfluous language, the Court ended its opinion by noting that Congress's intent for the

¹⁰¹ See *id.* at 827 (holding that § 1610(g) is not a freestanding exception).

¹⁰² See *id.* (holding plaintiffs could not collect by attaching the Persepolis Collection thereby forcing them to look for alternatives to execute their judgment).

¹⁰³ *Id.* at 816, 821.

¹⁰⁴ *Id.* at 819–21. Justice Kagan recused herself from the case. *Id.* at 827.

¹⁰⁵ *Id.* at 816–27.

¹⁰⁶ *Id.* at 823–24.

¹⁰⁷ 28 U.S.C. § 1610(g)(1); *Rubin IV*, 138 S. Ct. at 823–24.

¹⁰⁸ 28 U.S.C. § 1610(a)–(e); *Rubin IV*, 138 S. Ct. at 823–24.

¹⁰⁹ *Rubin IV*, 138 S. Ct. at 823–24.

¹¹⁰ *Id.* at 824.

¹¹¹ *Id.* at 824–27. The Court dismissed plaintiffs' arguments that "as provided by this section" refers to § 1610(f) rather than § 1610 as a whole, even though that view was supported by the Ninth Circuit in its *Bennett* decision. *Rubin IV*, 138 S. Ct. at 825–26; see *Bennett*, 825 F.3d at 959 (ruling that subsection (g) had a scope independent of the "commercial activity" requirement seen elsewhere in the statute). Similarly, the justices declined to read any implied intent into § 1610(g) because other sections within § 1610 explicitly outline the parameters of property eligible for attachment. *Rubin IV*, 138 S. Ct. at 825. Because § 1610(g) did not explicitly and universally eliminate foreign sovereign immunity for litigants who received § 1605A judgments, the Court did not want to read one into the statute. *Id.* at 825–27.

scope of § 1610(g) was not as broad as the plaintiffs contended.¹¹² The Court failed to examine the broader landscape of compensating victims of terror, leaving unanswered questions for the *Rubin* plaintiffs, and those similarly situated, in their pursuit of justice.¹¹³

II. WHY ANSWERING THIS QUESTION IN FAVOR OF THE VICTIMS WOULD HAVE BEEN CRITICAL TO PRESENT AND FUTURE VICTIMS OF TERROR

Currently, victims of terror lack any effective path to receive compensation for the injuries they and their loved ones have suffered.¹¹⁴ Although at first glance there are a myriad of avenues for victims to pursue and large sums of money that they could access, closer inspection reveals that none of these options are practically available, fair, or reliable.¹¹⁵ It was imperative for the United States Supreme Court in *Rubin v. Islamic Republic of Iran (Rubin IV)* to recognize this predicament and interpret § 1610(g) to create a precedent that would have compelled foreign sovereign countries who have materially supported acts of terrorism to compensate victims for injuries they sustained.¹¹⁶

¹¹² *Rubin IV*, 138 S. Ct. at 825–27. The plaintiffs argued the phrase “property of a foreign state” in § 1610(g)(1) would be rendered meaningless if the section did not remove immunity from all forms of foreign-owned property. *Id.* at 826–27. The whole point of revoking the *Bancec* factors in subsections (A)–(E) was to cover property owned by foreign agents or instrumentalities. *Id.* at 827. There would be no reason to include the phrase “property of the foreign state” if § 1610(g) did not also cover kinds of property that would actually be owned by a foreign government. *See id.* (considering whether any other interpretation would make the phrase superfluous). The Court rejected this argument, though, stating the phrase was more of an umbrella designed to cover the property addressed in *Bancec* and in subsections (A)–(E). *Id.* The scope of eligible property was somewhat expanded through the repeal of the *Bancec* factors in (A)–(E), and the Court found that to be enough to satisfy the stated intent to remove obstacles between the victims and their rightful compensation. *Id.*

¹¹³ *See id.* at 816–27 (failing to discuss other kinds of victim repayment while not acknowledging the lack of realistic and reliable options for plaintiffs to pursue moving forward).

¹¹⁴ *See Bradley, supra* note 12 (discussing how victims of Sudanese-sponsored attacks failed to benefit from a diplomatic deal between the U.S. and Sudanese governments); Consolidated Appropriations Act § 404 (providing a common fund for victims to receive compensation after a large buildup of unsatisfied judgments from terrorist attacks); *Libya Pays \$1.5 Billion, supra* note 70 (examining how victims eventually received compensation from a diplomatic settlement); Slobodzian, *supra* note 10 (reporting how victims and their families struggled to receive compensation after being awarded judgments from U.S. courts); *supra* notes 70–83 and accompanying text (explaining the shortcomings of other methods victims have tried to receive compensation).

¹¹⁵ *See Consolidated Appropriations Act § 404* (grouping many different plaintiffs from multiple attacks together after many years without effective action against pending terrorism-related judgments); Harris, *supra* note 21 (explaining other motivations that lead to a diplomatic agreement between the United States and Sudan that excluded any compensation for victims of Sudanese-sponsored terrorist attacks); *Libya Pays \$1.5 Billion, supra* note 70; (detailing a perfect storm of circumstances that led to a diplomatic agreement); Slobodzian, *supra* note 10 (reporting that victims of Iranian-sponsored terror agreements waited for decades to receive a judgment and were largely forgotten by the general public); *supra* notes 70–83 and accompanying text (detailing why and how these methods failed).

¹¹⁶ *See Rubin v. Islamic Republic of Iran (Rubin IV)*, 138 S. Ct. 816, 816–27 (2018) (failing to consider the consequences of the decision for the victims). This solution is even more appealing when

By allowing victims of terror to attach foreign-owned property that was not used for a commercial activity, more sources of funding would have been available and more innocent victims would have been able to receive compensation for their injuries.¹¹⁷

This section explains why the existing solutions for the *Rubin* plaintiffs, and others in similar situations, are unreliable and inadequate.¹¹⁸ Subsection A lays out the argument that diplomatic settlements have not, and will not, solve the current situation.¹¹⁹ Subsection B explains why legislative actions are not effective.¹²⁰ Finally, Subsection C analyzes the inefficacy of lower court rulings.¹²¹

A. Shortcomings of Diplomatic Agreements

Diplomatic solutions to compensation problems are difficult to reach, but they do provide clearer paths for victims to navigate so they receive at least some compensation.¹²² Rather than going through the court system and fighting a foreign government like the *Rubin* plaintiffs, the victims of the

compared with the alternative of the status quo, which involves competing foreign policy interests, individual judges' opinions of ambiguous statutes, or fighting amongst fellow victims for a small slice of the pie. *See Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016) (expanding the scope of eligible property under subsection (g)), *abrogated by Rubin IV*, 138 S. Ct. 816 (2018); *supra* notes 70–83 (detailing why other methods for receiving compensation have been ineffective). Indeed, the United Nations has specifically highlighted victims of terror and has called on member nations to help support them by publishing a report and convening a working group for these individuals. BAN KI-MOON, U.N. SEC'Y GEN., SUPPORTING VICTIMS OF TERRORISM (2009), http://www.un.org/en/terrorism/ctitf/pdfs/un_report_supporting_victims_terrorism.pdf [<https://perma.cc/L6MV-9SC9>]. As part of the U.N.'s "Global Counter-Terrorism Strategy," it is vitally important to provide some kind of "normalization" through compensation to combat the "dehumanization" that they experienced because of the given attack. *Id.*

¹¹⁷ *See generally* Petitioner's Brief, *supra* note 24 (arguing for a broader scope of attachable property that would generate more opportunities for victims to receive compensation without significant downside); *supra* notes 177–219 and accompanying text (describing why the Supreme Court came to the wrong conclusion and what it would have meant to rule differently).

¹¹⁸ *See supra* notes 122–175 and accompanying text.

¹¹⁹ *See supra* notes 122–139 and accompanying text.

¹²⁰ *See supra* notes 142–160 and accompanying text.

¹²¹ *See supra* notes 163–175 and accompanying text.

¹²² *See Libya Pays \$1.5 Billion*, *supra* note 70 (the families of Lockerbie bombing victims received some money as payment for their damages without having to sue for execution, though it took about twenty years to receive compensation). According to the article, a group of relatives of the Pan Am victims who died in the plane bombing were pleased that the Libyan government honored the agreement and expressed gratitude for Senator Lautenberg's efforts to push the U.S. government to finalize the deal. *Id.* Senator Lautenberg is a Democratic senator from New Jersey who co-sponsored the Libyan Claims Resolution Act, a piece of legislation that paired with the diplomatic agreement to end the dispute between the United States and Libya and helped create the victim compensation fund that drew from the money in the agreement. Libyan Claims Resolution Act, Pub. L. No. 110–301, 122 Stat 2999 (2008); 154 CONG. REC. S3797 (daily ed. July 31, 2008) (statement of Sen. Klobuchar); *Libya Pays \$1.5 Billion*, *supra* note 70.

Lockerbie bombing simply needed to prove to the court that: 1) the terrorist attack was state sponsored; and 2) they suffered an injury.¹²³ They did not need to fight to access property that they would compel their adversary to sell to satisfy the judgment.¹²⁴ Instead, they only had to ensure that they be counted as one of the victims eligible for the payments.¹²⁵

An arrangement similar to the Lockerbie bombing settlement is not a solution for people like the *Rubin* plaintiffs.¹²⁶ There must be a confluence of events—like a favorable business environment and unrelated political factors—that creates a perfect storm for an agreement like this one to be made.¹²⁷ The Lockerbie bombing is a rare example of a diplomatic deal between the United States and another country creating a fund with money coming from a foreign state that was specifically designated for victims of state sponsored terror attacks.¹²⁸

¹²³ See *Rubin v. Islamic Republic of Iran (Rubin III)*, 830 F.3d 470, 487 (7th Cir. 2016) (suing for access to the Persepolis Collection), *aff'd*, 138 S. Ct. 816 (2018); *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 269–70 (D.D.C. 2003) (holding plaintiffs were entitled to monetary damages after they proved they sustained injuries as victims of a state sponsored terror attack); *Libya Pays \$1.5 Billion*, *supra* note 70 (noting the Libyan government paid damages to victims of the bombing).

¹²⁴ Compare *Rubin III*, 830 F.3d at 487 (using the court system to execute their judgment), with *Libya Pays \$1.5 Billion*, *supra* note 70 (noting the Lockerbie plaintiffs went through diplomatic routes rather than the court system to execute their judgments).

¹²⁵ See 28 U.S.C. § 1605A (2012) (foreign states are not immune from paying monetary damages for actions related to the material support of terrorism); § 1610(g) (regarding claims arising from § 1605A); *Libya Pays \$1.5 Billion* (reporting on a group of easily identifiable victims, which seemingly made it easier for their families to come forward and be verified).

¹²⁶ Compare *Libya Pays \$1.5 Billion*, *supra* note 70 (describing various diplomatic and business interests that converged to create a climate uniquely favorable to a settlement that included terrorist victim compensation), with *Rubin IV*, 138 S. Ct. 816 (2018) (describing circumstances that did not include comparable foreign policy and economic interests). See also *supra* notes 111–112 and accompanying text (describing the plaintiffs' arguments and the Court's reasoning).

¹²⁷ See *Libya Pays \$1.5 Billion*, *supra* note 70 (reporting that the U.S. business community was invested in this outcome and wanted to regain access to the Libyan market, spurring U.S. diplomats to come to an agreement).

¹²⁸ See Bradley, *supra* note 12 (discussing how victims of Sudanese-sponsored attacks failed to benefit from a diplomatic deal between the U.S. and Sudanese governments); Broder, *supra* note 21 (noting victims of separate Iranian-sponsored terror attacks were compensated through U.S. funds rather than Iranian assets). A confluence of motivations and international events have to collide to provide motivation for all parties involved to come to the table for negotiations. See *Libya Pays \$1.5 Billion*, *supra* note 70 (highlighting how the deal allowed U.S. businesses to have greater access to the country and helped to normalize relations between the two governments). The United States also exerted extra pressure on Libya because Congress was set to pass legislation that would allow victims of terror to attach frozen government assets in the country. See Elise Labott, *U.S. Libya Deal Closes Book on Lockerbie*, CNN (Aug. 14, 2008), [http://webcache.googleusercontent.com/search?q=cache:Ms9JVFCm2UUJ:www.cnn.com/2008/WORLD/africa/08/14/lockerbie/index.html&hl=en&gl=us&strip=1&vwsr=0 \[https://perma.cc/N8ZW-ENHZ\]](http://webcache.googleusercontent.com/search?q=cache:Ms9JVFCm2UUJ:www.cnn.com/2008/WORLD/africa/08/14/lockerbie/index.html&hl=en&gl=us&strip=1&vwsr=0 [https://perma.cc/N8ZW-ENHZ]) (reporting on the legislation and how it would have affected Libya). By reaching this agreement, Libya would be exempt from the law and have its sovereign immunity restored. *Id.*

Other large diplomatic deals have tried to follow the Libyan model by including admissions of responsibility and forfeiture of funds, but none have achieved similar results for victims.¹²⁹ The U.S. government came to an agreement with the government of Iran near the end of the Obama Administration that kept Iran from creating a nuclear weapon in exchange for lifting economic sanctions against the country.¹³⁰ This was not all that came from diplomatic negotiations, however, as a second and lesser-known deal relieved the Iranians from their obligation to pay roughly four hundred million dollars in damages to U.S. victims of terrorist attacks carried out by Iranian proxies.¹³¹

United States diplomats in the Trump Administration face a high degree of pressure when negotiating diplomatic agreements involving victims of terror.¹³² In 2016, House Judiciary Chairman Bob Goodlatte and Senate Judiciary Chairman Chuck Grassley wrote a joint letter to Secretary of State Rex Tillerson urging the administration to secure an agreement with the government of Sudan to compensate American victims of terror who have sustained damages from attacks carried out by Sudanese-supported groups.¹³³ Unfortunately, for

¹²⁹ Letter from Bob Goodlatte, House of Representatives Judiciary Comm. Chairman & Chuck Grassley, Senate Judiciary Comm. Chairman to Rex Tillerson, Sec'y of State (Sept. 27, 2017), <https://www.judiciary.senate.gov/imo/media/doc/2017-09-27%20CEG,%20Goodlatte%20to%20Tillerson%20Sudan%20Sanctions.pdf> [<https://perma.cc/5M67-9TDA>] (hereafter Letter from Bob Goodlatte); (calling for Sudan to provide for victims of terror as part of any diplomatic agreement); Bradley *supra* note 12 (reporting that victims argued that the U.S. government squandered leverage that could have led the Sudanese to compensate victims of Sudanese-sponsored terror attacks); Broder, *supra* note 21 (reporting that a diplomatic deal between Iran and the United States forgave the Iranian government's debts regarding the repayment of damages for certain victims of Iranian-sponsored terrorist attacks).

¹³⁰ See *Iran Nuclear Deal: Key Details*, BBC, (Oct. 13, 2017), <http://www.bbc.com/news/world-middle-east-33521655> [<https://perma.cc/6JJP-YLY6>] (reporting on the agreement also including five other world powers). The deal included United Kingdom, France, Germany, Russia, and China, and called for Iran to reduce the number of centrifuges it uses to extract uranium, reduce the amount of weapons-grade uranium and plutonium, and become more transparent in its nuclear activities. *Id.*

¹³¹ Broder, *supra* note 21. In 1979, the United States seized \$400 million in Iranian funds after the 1979 Islamic revolution. *Id.* Victims of terror felt "betrayed" because the U.S. government alone paid the court judgments to American victims of Iranian-sponsored terrorist attacks, despite promises that the money would come from the Iranian funds. *Id.* The Iranian deal returned the seized money to Iran instead of allocating it to the victims. *Id.* In other words, the American people ended up footing the entire bill, and the Iranians paid nothing. *Id.* One Obama Administration official justified the decision by saying that the original plan in 2000 called for the damage claims to satisfy the United States, which the settlement did. *Id.* The Americans repaid the \$400 million plus an extra \$1.3 billion in interest for a total payment of \$1.7 billion. *Id.*

¹³² See Letter from Bob Goodlatte, *supra* note 129 (exerting pressure on the Administration to ensure that victims of terror were compensated).

¹³³ *Id.* According to the press release accompanying the letter, the Sudanese government sheltered and materially supported Al-Qaeda members in the years preceding the 1998 Al-Qaeda-sponsored bombings of the American embassies in Kenya and Tanzania. Press Release, Office of Senator Chuck Grassley, Grassley, Goodlatte Urge Administration to Seek Guarantees for Victims Before Lifting Terrorism-Related Sanctions on Sudan (Oct. 3, 2017), <https://www.grassley.senate.gov/news/news-releases/grassley-goodlatte-urge-administration-seek-guarantees-victims-lifting-terrorism> [<https://perma.cc/5RMU-5DV4>]. Victims have filed suit under the FSIA and have won judgments in American courts.

these victims, they were not part of the deal between the two countries that was announced on October 6, 2017.¹³⁴

The agreement lifted economic sanctions against Sudan in a show of goodwill after the Sudanese government's efforts to maintain peace and distance itself from terrorist organizations.¹³⁵ Many diplomats and academics supported the deal, including those who worked in the Obama Administration, but the families and representatives of these victims did not receive it well.¹³⁶ The Trump Administration, and many others in the African foreign affairs community, argued that the new agreement reflected a different and improving reality within Sudan.¹³⁷ Victim families and advocates, however, admonished the government for ignoring their interests.¹³⁸ The circumstances between the Iranian and Sudanese agreements were different, but both groups of affected victims were dissatisfied with the result.¹³⁹

B. Shortcomings of Legislative Solutions

Legislative solutions, like diplomatic agreements, are not a reliable or effective method to ensure financial compensation for the victims of terror attacks sponsored by foreign sovereigns.¹⁴⁰ Congress has repeatedly attempted to create legislation to help victims in one of two ways; either by creating independent funds that the victims can access or by making it easier to sue foreign sovereigns.¹⁴¹ Neither of these methods have proven to be effective, and the

Id. Representative Goodlatte is a Republican from Virginia, while Senator Grassley is a Republican from Iowa. *Id.*

¹³⁴ Harris, *supra* note 21.

¹³⁵ *Id.*

¹³⁶ Bradley, *supra* note 12; Harris, *supra* note 21.

¹³⁷ Harris, *supra* note 21. Specifically, administration officials pointed out that the government was no longer attacking civilians in Darfur, was no longer destabilizing South Sudan, and was collaborating with the U.S. government on counterterrorism activities. *Id.*

¹³⁸ Bradley, *supra* note 12; Harris, *supra* note 21.

¹³⁹ See Bradley, *supra* note 12 (expressing anger that the Trump Administration did not use leverage against the Sudanese to get compensation payments for victims); Broder, *supra* note 21 (reporting the unhappiness of the victims when they found out that Iran would not be compensating for their damages); Harris, *supra* note 21 (arguing that the victims were ignored).

¹⁴⁰ See Broder, *supra* note 21 (reporting that the Obama Administration paid back money to the Iranian government instead of using it to satisfy pending judgments regarding Iranian-sponsored terrorist attacks.) Victims of these attacks did receive compensation, but the money came from U.S. taxpayers and not from the party responsible for their damages. Broder, *supra* note 21. Similarly, the Trump Administration came to a diplomatic agreement with the Sudanese government that lifted economic sanctions as a reward for good behavior without receiving any settlements for pending judgments filed by U.S. victims of Sudanese-sponsored terrorist attacks. Harris, *supra* note 21. On the other hand, legislation meant to provide compensation to victims of terror attacks are ineffective because they pit victims against each other and do not have enough money to fully compensate everyone affected. Rodriguez, *supra* note 12, at 5–7.

¹⁴¹ See 28 U.S.C. § 1610 (describing exceptions to foreign sovereign immunity); *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 551 (S.D.N.Y. 2009) (describing how Congress enacted a bill that includ-

limited success of these attempts only underscore the Supreme Court's missed opportunity in *Rubin v. Islamic Republic of Iran (Rubin IV)* to create a solution for victims.¹⁴²

Shortly after the terrorist attacks of September 11, 2001 that took the lives of 2,752 individuals, Congress enacted the Air Transportation Safety and Stabilization Act (ATSSA), which created the September 11th Victims Compensation Fund (VCF).¹⁴³ The legislation was meant to provide compensation for victims and their families, but it also protected the airlines involved from endless lawsuits that would have likely destabilized the U.S. airline industry.¹⁴⁴ The fund, on the surface, was largely successful, as many victims successfully filed claims and were granted payments.¹⁴⁵ The process of applying for and receiving money, however, was not without controversy.¹⁴⁶ Each victim had to

ed a compensation fund for victims of 9/11); Rodriguez, *supra* note 12, at 5–6 (describing how common funds are distributed). Examples of this kind of legislation include the Air Transportation Safety and System Stabilization Act (“ATSSSA”) (intending to provide compensation to victims of the 9/11 attacks) and the James Zadroga 9/11, Health and Compensation Act of 2010 (intending to provide compensation to the first responders of the 9/11 attacks). James Zadroga 9/11, Health and Compensation Act of 2010, Pub. L. No. 111–347, 124 Stat. 3623 (codified as amended 42 U.S.C. § 300mm) (2012)) [hereinafter Zadroga Act]; Air Transportation Safety and Stabilization Act, Pub. L. No. 107–42, 115 Stat. 230 (2001); *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 551; Rodriguez, *supra* note 12, at 5–7.

¹⁴² See 28 U.S.C. § 1610(g) (eliminating the *Bancec* factors that had occasionally kept victims from attaching property owned by foreign sovereign instrumentalities); *Rubin IV*, 138 S. Ct. at 820 (holding that § 1610 did not include a freestanding exception to sovereign immunity in subsection (g)); Rodriguez, *supra* note 12, at 5–6 (discussing the problems victims face when trying to access compensation held in common funds).

¹⁴³ ATSSSA § 402-07; *In re Sept. 11 Litig.*, 600 F. Supp. 2d at 551.

¹⁴⁴ See *In re September 11 Litig.*, 600 F. Supp. 2d at 551 (holding that the number of claimants and claims threatened the stability of the American aviation industry). Speaking on the Senate floor on September 21, 2001, Senator John McCain said:

In addition to removing the specter of devastating potential liability from the airlines, and guaranteeing that the victims and their families will receive compensation regardless of the outcomes of the tangle of lawsuits that will ensue, the bill attempts to provide some sense to the litigation by consolidating all civil litigation arising from the terrorist attacks of September 11 in one court.

In re Sept. 11 Litig., 567 F. Supp. 2d at 619 (quoting 147 CONG. REC. S9589-01, S9594 (daily ed. Sept. 21, 2001) (statement of Senator McCain)). To protect the airlines, the ATSSA included a non-negotiable clause that individuals could only access the Victims Compensation Fund (VCF) if they agreed to never sue the airlines. ATSSA § 405(c)(3)(B)(i). According to the statute, claimants agreed to waive their right to sue for damages stemming from the 9/11 attacks in any federal or state court when they submitted a claim. *Id.*

¹⁴⁵ See *September 11th Victim Aid and Compensation Fast Facts*, CNN (Aug. 31, 2017), <https://www.cnn.com/2013/07/27/us/september-11th-victim-aid-and-compensation-fast-facts/index.html> [<https://perma.cc/936X-TU9N>] (detailing how many victims filed claims and how much money was awarded). From 2001 through 2003, the fund granted 5,560 out of 7,408 claims for a total amount over \$7 billion. *Id.*

¹⁴⁶ See Rodriguez, *supra* note 12, at 6 (reporting on victims who were confounded by the compensation distribution).

file an individual claim.¹⁴⁷ This created an adversarial atmosphere, causing victims to compete with one another for claims.¹⁴⁸ “Special master” Kenneth Feinberg sifted through the claims and tried to compensate everyone as best as he, and the fund, could.¹⁴⁹ He created a formula that included the victim’s age, health and income to come up with a valuation that could be used to determine their claim.¹⁵⁰

This pattern repeated itself nearly a decade later, when Congress passed the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga bill).¹⁵¹ The Zadroga bill was meant to provide for first responders to 9/11 who got sick from their actions, in much the same way the VCF did for victims.¹⁵² It created an almost three billion dollar fund to provide compensation for claimants and expanded the original VCF, using a similar claims system to determine who was entitled to what amount.¹⁵³ Again, Congress failed to provide

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* (reporting how he created a system using a number of factors to determine the appropriate award for each claim). Kenneth Feinberg was a lawyer appointed to oversee the VCF. *Id.* The fund was created less than two weeks after the September 11th attacks and did not provide Feinberg much guidance. *Id.* There was no legal precedent for such a fund, and Congress only passed a sparse statute with few details to help guide his decision-making. *Id.*

¹⁵⁰ *Id.* Feinberg has worked on a number of similar incidents since administering the VCF. *Id.* He managed claims for the 2010 BP oil spill in the Gulf of Mexico, the 2013 Boston Marathon Bombing, as well as the \$1.05 billion fund for other victims of terror that drew from the \$8.9 billion forfeiture agreement between the United States and BNP Paribas SA—a French bank that had close ties to terrorist financing. Rodriguez, *supra* note 12, at 6; Slobodzin, *supra* note 10.

¹⁵¹ *See* Zadroga Act, Tit. II, § 202 (codified as amended 49 U.S.C. § 40101 (2012)) (creating a common fund for first responders); *supra* note 150 (creating a formula after being appointed to lead a compensation fund).

¹⁵² *Compare* Zadroga Act, Tit. I, § 3301 (providing financial support to first responders of 9/11), with ATSSA § 405(c)(3)(B)(i) (attempting to do the same for victims). The Zadroga bill’s purpose was to provide:

(1) medical monitoring and treatment benefits to eligible emergency responders and recovery and cleanup workers (including those who are Federal employees) who responded to the September 11, 2001, terrorist attacks; and (2) initial health evaluation, monitoring, and treatment benefits to residents and other building occupants and area workers in New York City who were directly impacted and adversely affected by such attacks.

Zadroga Act, Tit. I, § 3301.

¹⁵³ SHEILA L. BIRNBAUM, FIRST ANNUAL STATUS REPORT: SEPTEMBER 11TH VICTIM COMPENSATION FUND (2012), <https://www.vcf.gov/pdf/VCFStatusReportOct2012.pdf> [<https://perma.cc/5DMJ-AQF6>]; *see* Zadroga Act, Tit. II, § 202 (creating an expanded fund including first responders); ATSSA § 405(c)(3)(B)(i) (creating a common fund where victims could file claims for compensation); Rodriguez, *supra* note 12, at 5–6 (describing the mechanics of the 9/11 VCF).

significant guidance.¹⁵⁴ Sheila Birnbaum, the new special master for the fund, had to create a system that again pitted victim against victim.¹⁵⁵

Congress has also attempted, and failed, to craft legislation that would create a clear legal path for victims of terror to use to receive compensation from foreign sovereigns.¹⁵⁶ The FSIA is an example of the legislative branch's well-meaning intentions and its inability to effectively put these good ideas into practice.¹⁵⁷ Much of the language in the FSIA, especially regarding what is and is not a stand-alone exception to foreign sovereign immunity from judgments, is ambiguous at best.¹⁵⁸ This led to the main disagreement between the Seventh Circuit in the *Rubin v. Islamic Republic of Iran* (*Rubin III*) decision and the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, as both courts came to different interpretations of the same statutory language.¹⁵⁹ The different interpretations exemplify Congress's failure to effectively communicate their intentions in the FSIA legislation.¹⁶⁰

C. Shortcomings of Judicial Solutions

Many of the same problems that have plagued diplomatic and legislative attempts to provide clarity to victims of terror have also effected the courts'

¹⁵⁴ See Rodriguez, *supra* note 12, at 6–7 (noting that Birnbaum had to create a system for distributing the funds nearly out of whole cloth).

¹⁵⁵ *Id.*

¹⁵⁶ See 28 U.S.C. § 1610 (carving out exceptions for victims of state sponsored terrorist attacks).

¹⁵⁷ See *id.* (intending to provide victims of terror with a significantly easier path towards recovery); *Rubin IV*, 138 S. Ct. at 820, 827 (holding that the expansions in the FSIA do not cover the Persepolis Collection and so forcing the *Rubin* plaintiffs to continue their decades-long search for compensation). Many, including the Supreme Court, have argued that Congress did not intend to allow all property to be attachable, but that reading seems doubtful in light of the goal of compensating victims. *Rubin IV*, 138 S. Ct. at 827; H.R. REP. NO. 110-477, at 1001 (2007).

¹⁵⁸ Compare *Rubin III*, 830 F.3d at 487 (holding that § 1610(g) was not a stand-alone exception), with *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) (holding that § 1610(g) was a stand-alone exception), overruled by *Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018). This disparity in two decisions by the same circuit just a few years apart demonstrates the ambiguity of the FSIA. See *Rubin III*, 830 F.3d at 487 (reversing precedent within the same circuit). In a 2014 decision regarding U.S. victims of Syrian government-sponsored terrorist attacks, the Seventh Circuit held in *Gates* that § 1610(g) allowed plaintiffs to attach assets held by the agencies and instrumentalities of state sponsors of terrorism even if factors described in § 1610(a) and (b) that would otherwise provide immunity existed. 755 F.3d at 576.

¹⁵⁹ Compare *Rubin III*, 830 F.3d at 487 (holding that acts of state sponsored terror only exposes foreign-owned property to attachment if it is located in the United States, used for commercial activity, and if the foreign actor is the party actually commercially using the property in question), with *Bennett*, 825 F.3d at 959, 965 (holding that any foreign-owned property located in the United States is eligible to be attached if the owner is a state sponsor of terror, regardless of what party uses the property and for what purpose it is used).

¹⁶⁰ See *Rubin III*, 830 F.3d at 484 (contradicting its own decision in *Gates* that was published two years before *Rubin*); *Bennett*, 825 F.3d at 959, 965 (reflecting a different interpretation of 28 U.S.C. § 1610).

attempts to do the same.¹⁶¹ The Seventh Circuit in particular has been unable to create a consistent precedent that both adheres to the law and provides fair compensation for victims of terror.¹⁶² Courts often provide judgments in favor of plaintiffs for millions of dollars only for the judgments to languish for decades because there is no clear legal way for the judgments to be fulfilled.¹⁶³ Occasionally, a windfall of money will become available but often falls short of compensating all plaintiffs possessing valid judgments.¹⁶⁴

¹⁶¹ See *Rubin III*, 830 F.3d at 484 (struggling to understand what Congress meant when determining if certain property falls into a state sponsor of terrorism exception); *supra* notes 72–83 (examples of issues faced by legislative and judicial attempts to fix the problem).

¹⁶² See *Rubin III*, 830 F.3d at 484 (breaking precedent just two years after it was created).

¹⁶³ See *Gates*, 755 F.3d at 571 (discussing the hunt to find compensation after a judgment has been awarded); *Rubin v. Islamic Republic of Iran (Rubin II)*, 709 F.3d 49, 50–51 (1st Cir. 2013) (recounting the initial judgment and the subsequent efforts by the *Rubin* plaintiffs to receive the money to which they are entitled); Slobodzian, *supra* note 10 (reporting on victims who waited years to receive settlements they had been awarded in court). There can be an enormous backlog of victims who are legally entitled to compensation who then come together to form a massive group in an attempt to get a lump-sum judgment or agreement that would create a fund for them to access. See Vivian Wang, *Manhattan Skyscraper Linked to Iran Can Be Seized by U.S., Jury Finds*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/06/29/nyregion/650-fifth-avenue-iran-terrorism.html> [<https://perma.cc/U7L4-ZXQ7>] (reporting how the case combined multiple lawsuits filed by the government and other victims of Iranian-sponsored terrorism). This happened in the BNP Paribas SA agreement, as well as the 650 Fifth Avenue litigation discussed below. See Wang, *supra* (discussing lots of terrorist victims' groups coming together); Rodriguez, *supra* note 12, at 7 (reporting that the fund should be meant for a wide array of victims).

¹⁶⁴ See *Gates*, 755 F.3d at 571 (discussing how the two parties of victims are competing with one another for the same money); Slobodzian, *supra* note 10 (reporting how different groups of victims were not fully compensated for their judgments). There have been common funds for the BNP Paribas SA agreement, the September 11th Victims Compensation Fund, the September 11th First Responders Fund, and will likely be one as a result of the 650 Fifth Avenue forfeiture. *Rubin III*, 830 F.3d at 484; Birnbaum, *supra* note 153; Rodriguez, *supra* note 12, at 5–7; *September 11th Victim Aid and Compensation Fast Facts*, *supra* note 145; Wang, *supra* note 163. This can lead to victims directly suing one another to determine who can access the pool of designated funds first. *Gates*, 755 F.3d at 570. This is a literal example of the competition between victims that was discussed previously regarding the 9/11 victims' and first responders' compensation funds. See *id.* (litigating a dispute between two groups of victims over compensation funds); BIRNBAUM, *supra* note 153 (detailing how a common fund would be distributed to first responders); Rodriguez, *supra* note 12, at 5–7 (reporting on the limited money available to 9/11 victims).

The appellants in *Gates* were the *Baker* plaintiffs. *Gates*, 755 F.3d at 570. Their case began in 1985 when terrorists from a Syrian government-backed terrorist group called Abu Nidal hijacked an EgyptAir flight. *Id.* After landing in a Maltese airport, an armed standoff ensued that led the terrorists to shoot Patrick Scott Baker, Jackie Nink Pflug, and Scarlett Marie Rogenkamp. *Id.* Baker and Pflug survived, while Rogenkamp died along with fifty-seven other passengers and crew members. *Id.* The appellees were the *Gates* plaintiffs, decedents of Olin Armstrong, and Jack Hensley. *Id.* Armstrong and Hensley were military contractors who were beheaded in September of 2004 by al-Qaeda in Iraq, another Syrian government-sponsored group. *Id.* The Seventh Circuit ruled in favor of the *Gates* plaintiffs, deciding they had a priority lien against Syrian government-owned property in the U.S. *Id.* at 580–81. That the two parties were forced to race against each other to file attachments against various Syrian-owned properties in the United States shows how broken this system of victim compensation has become. See *id.* at 571 (litigating a fight between two groups of victims over limited resources).

One recent example of this pattern played out in the summer of 2017, when the Southern District of New York ruled that the Iranian-based Atavi Foundation was legally compelled to sell its sixty percent ownership stake in a skyscraper in Manhattan located at 650 Park Avenue.¹⁶⁵ The expected one billion dollars that would be raised from the sale of the ownership interest in the building, coupled with seizing a number of related real estate properties and Iranian-held bank accounts scattered across the United States, will be used to satisfy judgments in favor of American victims of Iranian state sponsored terrorist attacks.¹⁶⁶

This judgment succeeded where the *Rubin IV* case fell short because the property in question (650 Fifth Avenue) was used by an instrumentality of the Iranian government for a commercial activity and therefore fulfilled an applicable exception outlined in the FSIA.¹⁶⁷ The Persepolis Collection, on the other hand, which is the property at issue in the *Rubin* cases, did not meet the commercial activity standard and so has forced the *Rubin* plaintiffs to argue that property does not need to be used for commercial activity at all to be eligible for attachment under the FSIA.¹⁶⁸ The *Rubin* plaintiffs theorized that any property owned by Iran in the United States should have been eligible for at-

¹⁶⁵ Linda Barr O'Flanagan, *Government Gets Go-Ahead to Sell Iran-Linked 650 Fifth*, REAL EST. WKLY. (July 3, 2017), <https://rew-online.com/2017/07/government-gets-go-ahead-to-sell-iran-linked-650-fifth/> [<https://perma.cc/QRT3-KRZ9>]; Wang, *supra* note 163. The court found that, although the building was owned by Atavi and not by the Iranian government, there was enough evidence to show that the two were heavily intertwined. O'Flanagan, *supra*. Atavi would use its assets to funnel millions of dollars from the United States into Iranian government bank accounts. *Id.* For this reason, the court considered 650 Fifth Avenue, and assorted other bank accounts throughout the United States, to be property of the Iranian government. *Id.* Atavi and the Iranian government are expected to appeal this decision. *Id.*

¹⁶⁶ Wang, *supra* note 163. This ruling created what some are calling the largest terrorism related civil forfeiture in United States history. O'Flanagan, *supra* note 165; Wang, *supra* note 163. The property is unquestionably valuable, as evidenced by Nike's recent announcement that it would open a flagship store in the first five stories of the building. Emily Price, *Nike Will Close Its Flagship NYC Store in Spring, New One Coming in 2019*, FORTUNE (Dec. 4, 2017), <http://fortune.com/2017/12/04/nike-will-close-its-flagship-nyc-store-in-spring-new-one-coming-in-2019/> [<https://perma.cc/X9GY-AH66>].

¹⁶⁷ See 28 U.S.C. § 1610 (stipulating the need for the property in question to be used for a commercial activity); *Rubin v. Islamic Republic of Iran (Rubin IV)*, 138 S. Ct. 816, 827 (2018) (holding that the property in question was not attachable because the state sponsor exception was not a free-standing exception); *Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 472, 527, 536 (S.D.N.Y. 2017) (holding that the defendants violated the FSIA). In a written decision, Judge Katherine B. Forrest of the United States District Court for the Southern District of New York found that she was convinced the Iranian government appointed and directed the day-to-day operators of the Atavi Foundation to make sure the Foundation acted within the government's interests. O'Flanagan, *supra* note 165.

¹⁶⁸ See 28 U.S.C. § 1610 (stipulating that property is eligible for attachment only if it used for a commercial activity); *Rubin IV*, 138 S. Ct. at 821 (describing what property the plaintiffs were trying to access); *Rubin III*, 830 F.3d at 473 (holding that the statute did not include a free-standing exception for property not used for a commercial activity); O'Flanagan, *supra* note 165 (discussing the commercial activity of a skyscraper in Manhattan).

tachment because they filed a claim under the state sponsor of terrorism exception.¹⁶⁹

The relative success of the 650 Fifth Avenue forfeiture only highlights the shortcomings of the system as a whole.¹⁷⁰ There is a large plaintiff class because opportunities to compensate these victims from foreign sovereign coffers are so rare.¹⁷¹ Due to the size of the judgment and the number of victims who are seeking compensation, there will likely be a “special master” appointed like for the BNP Paribas SA and the September 11th funds.¹⁷² Finally, if history is any indication, those victims who do receive some compensation from the fund are not likely to get what previous U.S. courts determined to be a fair amount.¹⁷³ There is currently no other way for the judicial system to compensate American victims of terror while using foreign sovereign funds.¹⁷⁴ Due to the Supreme Court’s decision in *Rubin IV*, the courts will forever have one arm tied behind their backs, hindered by a limited ability to touch foreign sovereign property that is not used for commercial use.¹⁷⁵

¹⁶⁹ 28 U.S.C. § 1605A; *Rubin III*, 830 F.3d at 473; Petitioner’s Brief, *supra* note 24, at 24.

¹⁷⁰ See Wang, *supra* note 163 (reporting that the victims in the group were able to receive some kind of compensation for their injuries, but after decades of work and will likely now be forced to compete for a finite amount of available money); *supra* notes 72–83 and accompanying text (examples of judiciary and legislative failures to fix the issues).

¹⁷¹ See *Gates v. Syrian Arab Republic*, 755 F.3d 568, 571 (7th Cir. 2014) (stating that the victims were forced to race each other), *overruled by Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff’d*, 138 S. Ct. 816 (2018); Wang, *supra* note 163 (reporting on a group of plaintiffs gaining access to compensation, if there was easier access to compensation funds, there would be little incentive for victims to form such large groups and compete over a scarce and finite resource).

¹⁷² See BIRNBAUM, *supra* note 153 (detailing how funds were distributed for 9/11 first responders); *September 11th Victim Aid and Compensation Fast Facts*, *supra* note 145 (detailing how funds were distributed for 9/11 victims); Slobodzian, *supra* note 10 (reporting on the distribution of compensation for U.S. victims of other Iranian government-sponsored terror attacks); Wang, *supra* note 163 (describing how a case brings together many different groups of plaintiffs into a larger class).

¹⁷³ See, e.g., *Rubin IV*, 138 S. Ct. at 820, 827 (holding that courts are now precluded from using subsection (g) on foreign sovereign-owned property unless it fits within another subsection of the FSIA); *Rodriguez* note 12, at 5–6 (reporting on 9/11 victims’ inability to be fully compensated from the fund Congress created); Slobodzian, *supra* note 10 (describing how a group of victims are not able to receive the full judgment).

¹⁷⁴ See 29 U.S.C. § 1610(g) (providing a specific way for victims of terror to execute their judgments); Broder, *supra* note 21 (describing an agreement between the U.S. and Sudanese governments that did not include any agreement about terrorist victim compensation); Birnbaum, *supra* note 153 (reporting on another example of a common fund for victims); *Libya Pays \$1.5 Billion*, *supra* note 70 (describing how victims of the Lockerbie bombing were able to receive compensation after a diplomatic agreement between the U.S. and Libyan governments); *September 11th Victim Aid and Compensation Fast Facts*, *supra* note 145 (describing how money is allocated through a common victim fund); Slobodzian, *supra* note 10 (describing how victims of Iranian-sponsored attacks eventually received compensation from a fund created by Congress using the forfeited money from the French bank BNA Paribas SA).

¹⁷⁵ See 28 U.S.C. § 1610(g) (refusing to specify what kind of property is covered by the subsection); *Rubin IV*, 138 S. Ct. at 824–27 (ruling that Congress did not intend for the scope of eligible property to be as wide as the plaintiffs argued, even though Congress stated that it intended for

III. WHY THE SUPREME COURT SHOULD HAVE SIDED WITH THE *RUBIN* PLAINTIFFS

The United States Supreme Court heard oral arguments in *Rubin v. Islamic Republic of Iran (Rubin IV)* on December 4, 2017 and authored its decision on February 21, 2018.¹⁷⁶ After hearing from the plaintiffs, the respondents, and the United States government, the Court had an opportunity to provide justice to victims who have long been denied compensation.¹⁷⁷ Expanding the scope of § 1610(g) so that it covers property that was not used for a commercial activity as defined in § 1610(a) and (b) not only would have fit within the correct statutory interpretation of the text and Congressional intent of the legislation, but also would have provided a path for future victims of terror without causing harm to other museums or academic institutions concerned about losing similar antiquities.¹⁷⁸

Subsection A details why the Supreme Court incorrectly interpreted the statute when deciding against the *Rubin* plaintiffs.¹⁷⁹ Subsection B explains how this new ruling would have fixed many of the current issues facing victims of terror in their attempts to execute the judgments they have been award-

§ 1610(g) to provide a significant amount of relief to victims who were struggling to find attachable property to satisfy their judgments); *Rubin III*, 830 F.3d at 484 (struggling to find a consistent understanding of Congress's intent); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 571 (7th Cir. 2014) (understanding the predicament both parties found themselves without any easy solution), *overruled by Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018).

¹⁷⁶ *Rubin v. Islamic Republic of Iran (Rubin IV)*, 138 S. Ct. 816, 816 (2018). Asher Perlin argued on behalf of the plaintiffs, David A. Strauss argued on behalf of the respondents, and Assistant Solicitor General Zachary D. Tripp argued on behalf of the United States government as *amicus curiae*, supporting the respondents. Transcript of Oral Argument at 1, *Rubin IV*, 138 S. Ct. 816 (2018) (No. 16-534), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-534_if5n.pdf [<https://perma.cc/GZ5T-5LWR>].

¹⁷⁷ See *Rubin IV*, 138 S. Ct. 816 at 820–21 (detailing the procedural history of the case). The Foundation for Defense of Democracies, Victims of Iranian Terrorism, and a group representing former U.S. counterterrorism officials each filed a brief in support of the plaintiffs. *Rubin v. Islamic Republic of Iran*, SCOTUS BLOG (2018), <http://www.scotusblog.com/case-files/cases/rubin-v-islamic-republic-of-iran-2/> [<https://perma.cc/L9GR-YCFC>]. On the other side, both the government of Iran and the University of Chicago filed separate respondent briefs, while the United States' government filed a supporting brief. *Id.* The *Rubin* plaintiffs were first injured in 1997, received a judgment in 2005, and have spent the next decade plus seeking execution on this judgment. *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 261 (D.D.C. 2003); see *Rubin v. Islamic Republic of Iran (Rubin III)*, 830 F.3d 470, 473 (7th Cir. 2016) (explaining when the plaintiffs first received a judgment to compensate them for their injuries), *aff'd*, 138 S. Ct. 816 (2018); *7 Killed by Bomb Blasts in Jerusalem*, *supra* note 1 (reporting on the terrorist attack that caused the plaintiffs' injuries).

¹⁷⁸ See 28 U.S.C. § 1610(a)–(b), (g) (2012) (exceptions for foreign sovereign immunity); H.R. REP. NO. 110-477, at 1001 (2007) (describing the intended scope of § 1610(g) and Congress's efforts to smooth the process for victims); Petitioner's Brief, *supra* note 24, at 28; Transcript of Oral Argument at 22, *Rubin IV*, 138 S. Ct. 816 (arguing that concerns over the future of foreign antiquities in the United States are overblown); see also *infra* notes 214–219 and accompanying text (explaining why expanding subsection (g) would not have negative consequences on foreign antiquities in the U.S.).

¹⁷⁹ See *infra* notes 182–207.

ed.¹⁸⁰ Finally, Subsection C addresses how an expanded § 1610(g) would have affected the future of foreign-owned antiquities in the United States, and explains why any fear that these objects would be lost permanently are outweighed by the benefits conferred to victims.¹⁸¹

A. Statutory Justifications for Expanding § 1610(g)

The debate between the United States Court of Appeals for the Seventh and Ninth Circuits regarding the meaning of § 1610(g) could have been easily settled considering the Congressional intent of the statute and how it fits into the FSIA as a whole.¹⁸² According to the conference report, Congress meant for § 1610(g) to significantly expand the kind of property that victims could attach to execute judgments against state sponsors of terror.¹⁸³ The legislature meant for this statute to be more than just a mechanism for victims to pierce the “corporate” veil of state-owned businesses and access assets that could be sold to satisfy the country’s debts.¹⁸⁴ Congress did not mean for § 1610(g) to have any limitations.¹⁸⁵

¹⁸⁰ See *infra* notes 203–213.

¹⁸¹ See *infra* notes 214–219.

¹⁸² Petitioner’s Brief, *supra* note 24, at 28; see *Rubin III*, 830 F.3d at 487 (holding that subsection (g) was restricted by the other subsections in the statute); *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959, 965 (9th Cir. Feb. 22, 2016) (holding that subsection (g) did not have any restrictions), *abrogated by Rubin IV*, 138 S. Ct. 816 (2018); *infra* note 183 (explaining the Congressional intent of the legislation).

¹⁸³ See H.R. REP. NO. 110-477, at 1001 (stating that “§ 1610(g) is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution”). The Supreme Court did not lend proper weight to just how much Congress intended to expand the scope of eligible property through § 1610(g). See *Rubin IV*, 138 S. Ct. at 827 (minimizing the impact Congress intended the legislation to have). The Court did briefly consider congressional intent at the end of the *Rubin* opinion, but it misinterpreted how far Congress wanted to go. See *id.* (holding that Congress only wanted to eliminate the *Bancec* factors). Allowing all property to be attachable under a § 1605A claim through the correct interpretation of § 1610(g) would have significantly expanded the statute’s the scope, exactly what Congress intended. See *Rubin IV*, 138 S. Ct. at 827 (limiting the scope of subsection (g) to eliminating the *Bancec* factors); H.R. REP. NO. 110-477, at 1001 (discussing the intended scope of subsection (g)).

¹⁸⁴ Petitioner’s Brief, *supra* note 24, at 27; see H.R. REP. NO. 110-477, at 1001 (applying subsection (g) to all property). Congress’s most recent amendment to the Foreign Sovereign Immunity Act came in 2012 with the passage of JASTA. Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 852 (2016); see *supra* notes 13–15 and accompanying text (briefly describing JASTA and its goals). In this amendment, Congress explicitly laid out its intent for the act as a whole when it stated:

The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.

JASTA § 2(b). Piercing the corporate veil is a corporate law term that is applicable in this context, as well. See STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:1 (1998) (describing the ele-

Multiple courts agreed with an assessment that the subsection in question covered all foreign-owned property, including the United States District Court for the District of Columbia and the Southern District of California, as well as the United States Court of Appeals for the Ninth Circuit and Seventh Circuit (prior to *Rubin v. Islamic Republic of Iran (Rubin III)*).¹⁸⁶ The Seventh Circuit, however, came to an opposite conclusion in *Rubin III*, and the Supreme Court followed suit by upholding the decision.¹⁸⁷

ments needed to pierce the veil of a corporation); Petitioner's Brief, *supra* note 24, at 27 (discussing the legal veil of foreign sovereigns). In business, as in international diplomacy, it is important for owners to have limited liability. See PRESSER, *supra* (describing the role of the corporate veil in business that parallels how the veil works with foreign sovereigns). If a business is held liable for its liabilities, creditors cannot seek the owners' independent and individual assets to fulfill the debts of the business. *Id.* It is only when the business and the owner are legally indistinguishable can someone pierce through the veil of the business to reach into the assets of the owner. *Id.* The same dynamic is present in international situations like the one facing the *Rubin* plaintiffs. See Petitioner's Brief, *supra* note 24, at 27 (stating that § 1610(g) allows victims to pierce the "corporate" veil of foreign sovereign governments).

¹⁸⁵ See H.R. REP. NO. 110-477, at 1001 (stating explicitly that § 1610(g) did not have any limitations); Petitioner's Brief, *supra* note 24, at 30-49, 58-61 (explaining the legislative background and textual particularities that indicate Congress intended § 1610(g) to have as broad a scope of attachable property as possible). The language of the statute does not modify what kind of property is eligible for attachment, a clear difference from other sections which expressly define the scope of property available to plaintiffs. Compare 28 U.S.C. § 1610(b) (stating that "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment"), with § 1610(g) (stating that "the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment").

¹⁸⁶ *Bennett*, 825 F.3d at 960; *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015) (allowing plaintiffs to attach Syrian government debts held by a U.S. bank and telecommunications company), *overruled by Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014), *overruled by Rubin III*, 830 F.3d 470 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816 (2018); Ministry of Def. & Support for the Armed Forces v. Cubic Def. Sys., 984 F. Supp. 2d 1070, 1082 (S.D. Cal. 2013) (finding that Congress included § 1610(g) to allow victims of state sponsored terror attacks to attach foreign sovereign-owned property in the United States), *aff'd sub nom.* Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Frym, 814 F.3d 1053 (9th Cir. 2016); *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11, 18 (D.D.C. 2011) (ruling that decedents for nineteen U.S. military members who were killed in a 1996 tanker truck explosion in Saudi Arabia received a judgment by filing an attachment against Iranian debts held by Sprint, which did not contest that § 1610(g) covered the property in question); *Calderon-Cardona v. Democratic People's Republic of Korea*, 723 F. Supp. 2d 441, 458 (D.P.R. 2010) (deciding that § 1610(g) provided easier paths for enforcement of § 1605A judgments). In the *Rubin* decision, the Seventh Circuit admitted that the prior decisions assumed the question at issue here. *Rubin III*, 830 F.3d at 485. The Seventh Circuit in *Gates v. Syrian Arab Republic* did not feel it was necessary to even discuss the scope of § 1610(g), seemingly because it was so obvious it was not worth the time. See generally, 755 F.3d 568 (accepting that § 1610(g) had a broad scope). Furthermore, Judge Lamberth, who authored the *Estate of Heiser v. Islamic Republic of Iran* decision, wrote that "Congress made no exceptions" to the reach of § 1610(g). Petitioner's Brief, *supra* note 24, at 28 (citing *Estate of Heiser*, 807 F. Supp. 2d at 21).

¹⁸⁷ *Rubin IV*, 138 S. Ct. at 820, 827; *Rubin III*, 830 F.3d at 487.

An expansive reading of § 1610(g) is made even stronger when one examines the subsection in the context of the FSIA as a whole.¹⁸⁸ Other parts of § 1610, specifically subsection (a), specifies what kind of property is covered by that individual subsection.¹⁸⁹ On the other hand, § 1610(g) does no such thing.¹⁹⁰ The word “property” is not modified by any phrases or words meant to limit its scope.¹⁹¹ Furthermore, parts of subsection (g) specifically expand the scope of property available to victims by eliminating the restrictions that had been in place with the *Bancec* factors described above.¹⁹² One of those factors in particular, § 1610(g)(1)(C), allows for property to be attached regardless of the amount of control that the foreign state exerts over the daily affairs of the item in question.¹⁹³ Because of the blanket treatment of property in § 1610(g), every other section of § 1610, specifically subsections (a) and (b), should not be considered applicable.¹⁹⁴ If the foreign government needed to use the property in question for a commercial activity (a kind of control defined in subsection (a)) in order to be stripped of foreign sovereign immunity, then it would render subsection (g)(1)(C) irrelevant, because that specifically addressed whether any type of control needed to be present.¹⁹⁵

¹⁸⁸ Petitioner’s Brief, *supra* note 24, at 31–36.

¹⁸⁹ *Id.* at 31. According to § 1610(a), property that would be excluded under that subsection must (i) be used (ii) by the foreign sovereign state itself, (iii) for some kind of commercial activity, (iv) in the United States, and also if one of the other enumerated exceptions applies. *Id.* (citing 28 U.S.C. § 1610(a)(1)–(7)).

¹⁹⁰ See 28 U.S.C. § 1610(g) (omitting any limitations to kinds of eligible property).

¹⁹¹ *Id.*

¹⁹² *Id.* § 1610(g)(1)(A)–(E); Petitioner’s Brief, *supra* note 24, at 32; see *supra* note 184 (describing the corporate veil dynamic addressed by the statute). The Supreme Court pointed out this difference as a reason to rule against the plaintiffs, when it should have come to the opposite conclusion. See *Rubin IV*, 138 S. Ct. at 827 (limiting the scope of (g) to the *Bancec* factors). By not modifying the word “property,” Congress signified its intent for all property to be attachable under § 1610(g). See 28 U.S.C. § 1610(g) (specifically leaving “property” un-modified, without any specifications about what kind should or should not be covered); H.R. REP. NO. 110-477, at 1001 (indicating an intent for § 1610(g) to reach “any” foreign sovereign property interest). Up until 2008, courts used five factors outlined in its 1983 *Bancec* decision to determine if property could be attachable under a claim related to a state sponsored terrorist attack. Petitioner’s Brief, *supra* note 24, at 13. *Bancec* created a general presumption that foreign-owned property would not be attached to execute a judgment if it was owned by a “juridically separate agency or instrumentality.” *Rubin III*, 830 F.3d at 482. The NDAA, specifically § 1610(g)(1)(A)–(E), eliminated each of the five factors. 28 U.S.C. § 1610(g)(1)(A)–(E); *Rubin IV*, 138 S. Ct. at 827.

¹⁹³ 28 U.S.C. § 1610(g)(1)(C); Petitioner’s Brief, *supra* note 24, at 32–33; see *Rubin IV*, 138 S. Ct. at 820, 827 (holding that § 1610(g) does not cover all kinds of property). The same argument goes for other parts of § 1610(g)(1), as well. Petitioner’s Brief, *supra* note 24, at 33 (arguing that § 1610(b) has similar problems). Section 1610(g)(1)(A) specifies that property can be attached regardless of the level of economic control that the foreign state possesses, while § 1610(g)(1)(B) does away with the requirement that profits from the property must go to the foreign government itself. 28 U.S.C. § 1610(g)(1)(A)–(B); Petitioner’s Brief, *supra* note 24, at 33.

¹⁹⁴ Petitioner’s Brief, *supra* note 24, at 33; see *infra* note 199 (explaining why any other interpretation would make the language of subsection (g) meaningless).

¹⁹⁵ Petitioner’s Brief, *supra* note 24, at 33

Furthermore, the Seventh Circuit and Supreme Court's interpretation of § 1610(g) cannot be reconciled with the language and structure of § 1610(b).¹⁹⁶ Section 1610(g) allows for plaintiffs to seek an attachment on property owned by an agent or instrumentality of a foreign state whether or not the agent itself waived foreign sovereign immunity.¹⁹⁷ Section 1610(b), on the other hand, specifies that property owned by an agent or instrumentality of a foreign state can only be attached if it was used for a commercial activity and if the agent or instrumentality itself did something that stripped immunity.¹⁹⁸ Again, if, as the Seventh Circuit held in *Rubin IV* and the Supreme Court reaffirmed, any § 1610(g) claim on foreign-owned property needed to also satisfy the "commercial activity" requirement elsewhere in § 1610, then subsection (g) would be completely subsumed and nullified.¹⁹⁹

A foreign government that knows U.S. courts have levied judgments against them for sponsoring acts of terror could use this construction to permanently shelter their money from the victims trying to get compensation.²⁰⁰ They would simply keep their money in some agent or instrumentality—like a bank—that is not owned by the country nor is independently guilty of doing

¹⁹⁶ *Id.* Compare 28 U.S.C. § 1610(b) (stating that "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment"), with § 1610(g) (stating that "the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment").

¹⁹⁷ Petitioner's Brief, *supra* note 24, at 34; see 28 U.S.C. § 1610(g) (failing to specify any limits to the kind of property eligible to be attached in a § 1605A claim).

¹⁹⁸ Petitioner's Brief, *supra* note 24, at 34. Along with the commercial activity requirement, § 1610(b) stipulates that the agent or instrumentality must have waived its immunity in some way or that the agent or instrumentality is not immune under § 1605(a)–(b) or § 1605A. § 1610(b); Petitioner's Brief, *supra* note 24, at 34. Both § 1610(a)(7) and (b)(3) specify that § 1605A judgments are also included under the commercial property exemption from attachment immunity. 28 U.S.C. § 1610(a)(7), (b)(3). That does not, however, mean that § 1610(g) should be limited to that requirement, as well. Petitioner's Brief, *supra* note 24, at 41. Expanding the scope of subsection (g) to all property in § 1605A judgments would not make (a)(7) and (b)(3) superfluous because those subsections also include judgments from § 1605(a)(7)—the old version of state sponsored terrorism that was replaced by § 1605A. *Id.*

¹⁹⁹ Petitioner's Brief, *supra* note 24, at 34. The requirements of § 1610(b) cover all kinds of property that are supposedly opened up by § 1610(g). 28 U.S.C. § 1610(b), (g); Petitioner's Brief, *supra* note 24, at 36. By limiting the scope of § 1610(g), plaintiffs are required to prove that the agent of the foreign government that owns the property is also liable for the claim. Petitioner's Brief, *supra* note 24, at 34. Section 1610(b)(3) specifies that property of an agent may be attached if the agent itself is not immune due to a § 1605A claim. § 1610(b)(3); Petitioner's Brief, *supra* note 24, at 34. Therefore, the plaintiffs need to prove that the agent itself was independently liable for the § 1605A claim. Petitioner's Brief, *supra* note 24, at 34. This eliminates the point of voiding the *Bancec* factors because that action was meant to allow the plaintiffs to pierce the veil of the instrumentality due to the foreign government's actions, not the actions of the agent itself. *Id.*

²⁰⁰ See Petitioner's Brief, *supra* note 24, at 34 (arguing that the Seventh Circuit's interpretation of (g) requires that the agent of a foreign government also needs to be proven liable). The Supreme Court failed to address this loophole in its decision. See generally *Rubin IV*, 138 S. Ct. 816 (ruling on the scope of § 1610(g) without addressing the consequences of its decision).

anything that would strip foreign sovereign immunity from itself.²⁰¹ This statutory interpretation would create an loophole for foreign sovereign states and leave plaintiffs with few options to recoup their damages.²⁰²

B. Practical Justifications for Expanding § 1610(g)

There is no reason to value the immunity of a country that provides material and financial support to terrorist organizations over the interests of American victims of terror.²⁰³ Section 1610(g) of the FSIA was the last and best hope

²⁰¹ See *supra* note 198 (describing the loophole in the Court's understanding of the statute). This is exactly what happened with the *Bennett v. Islamic Republic of Iran*, as Visa owed the government of Iran money that the *Bennett* plaintiffs were trying to attach to satisfy their judgments relating to damages from Iranian-sponsored terrorist attacks. 825 F.3d at 957. The Iranian government argued that the plaintiffs could not collect the money because Visa itself had done nothing wrong, therefore not fulfilling the prongs of § 1610(b), which would have caused the § 1610(g) claim to fail. Petitioner's Brief, *supra* note 24, at 34–35.

²⁰² See Petitioner's Brief, *supra* note 24, at 34–36 (arguing that plaintiffs would have to find both the government and the instrumentality liable).

²⁰³ See Danica Curavic, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions*, 43 CORNELL INT'L L. J. 381, 398–99 (2010) (arguing that certain studies of the FSIA indicate it may not provide much deterrence). Studies examining the effect of the FSIA on the behavior of other countries are at best inconclusive. See *id.* (arguing that some studies do not conclusively show a decline in state sponsored terrorism activity). Though a 2006 report by the National Counterterrorism Center found a global decrease in state sponsored terrorism, two notable exceptions to this trend are Iran and Syria (two countries that appear frequently in foreign sovereign property cases involving § 1605A claims). *Id.* Finding that the FSIA has not deterred state sponsorship of terrorism could lead some, including Professor Curavic, to conclude that the statutory framework is not working. See *id.* at 401 (arguing in favor of a new strategy to fight international terrorism). It could also lead others to conclude that the protection of culturally significant property prior to the NDAA in 2008 did nothing to change the calculus of state sponsored terrorism. See *id.* at 398–99 (describing how Iran and Syria's behavior had not changed with the FSIA). It is tempting to argue in favor of protecting property like the artifacts in the Persepolis Collection, but the benefit of attaching this property to the *Rubin* plaintiffs is quantifiable and real, while the potential benefits of protecting the Collection due to an abstract notion of "cultural diplomacy" is difficult to quantify and has proven to be ineffective. See *Rubin IV*, 138 S. Ct. at 820, 827 (refusing to provide the plaintiffs with an easy way to execute their judgment); Curavic, *supra*, at 398–99 (debating how effective the FSIA has been in deterring state sponsored terrorist attacks).

Furthermore, the importance of protecting foreign sovereign immunity through the FSIA has been overstated. See Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 434–46 (2015) (examining the variability in the application of foreign sovereign immunity across different countries and circumstances). The FSIA has not uniformly protected all countries eligible for immunity. *Id.* at 446–47. Instead, U.S. district courts have granted immunity based on a number of factors beyond the letter of the law, including legal and political considerations. *Id.* at 447. Whether a given country has a large amount of commercial activity and contracts with the United States, is a democracy, or is a member of the Organization for Economic Co-operation and Development influences the likelihood that it will receive immunity. *Id.* at 447, 459. By considering a number of extraneous factors like the ones mentioned above, the universal and automatic application of foreign sovereign immunity loses its importance. See *id.* (arguing that other factors are also considered when deciding whether or not to grant immunity). If the U.S. court system considers factors like the kind of government, it should also consider the

for victims to hold their assailants accountable for their actions.²⁰⁴ It is futile to wait for diplomatic agreements that only come when a variety of independent factors convene that coincidentally benefit victims.²⁰⁵ Furthermore, even if any kind of relief could come under the current state of affairs—whether from an agreement, a common fund set up by donations and American taxpayers, or some kind of executable judgment against a foreign state—the victims would be forced to either fight amongst themselves or would be locked into a fixed compensation scheme that would not cover the true amount of damages to which they are legally entitled.²⁰⁶

By expanding the scope of eligible property under § 1610(g), the Supreme Court could have gone a long way towards alleviating this dynamic.²⁰⁷

effect on victims of terror attacks. *See id.* (arguing that it considers factors beyond what is stipulated in the law).

²⁰⁴ *See Rubin III*, 830 F.3d at 487 (contradicting prior precedent and another circuit court's decision about the same statutory language); *Gates*, 755 F.3d at 570 (concerning two groups of U.S. victims of different Iranian-sponsored terrorist attacks suing each other for access to limited resources meant to cover related judgments); *Rubin v. Islamic Republic of Iran (Rubin II)*, 709 F.3d 49, 51 (1st Cir. 2013) (describing the other attempts the *Rubin* plaintiffs to execute their judgment); Bradley, *supra* note 12 (describing how the Trump Administration brokered a deal with the Sudanese government that lifted sanctions in exchange for policies moving away from supporting terror organizations without addressing pending judgments for U.S. victims of Sudanese-sponsored terrorist attacks); Broder, *supra* note 21 (explaining how the U.S. government paid back money to Iran rather than use it to execute the judgments for victims of Iranian-sponsored terror attacks); Rodriguez, *supra* note 12, at 5–7 (reporting how congressionally created compensation pools like the 9/11 victims' fund were ineffective).

²⁰⁵ Bradley, *supra* note 12 (theorizing why victims of Sudanese-sponsored terrorist attacks were not included in the diplomatic agreement between the United States and Sudan, specifically noting reports indicating that Sudan had agreed to enforce U.N. sanctions against North Korea); *Libya Pays \$1.5 Billion*, *supra* note 70 (describing all the interests that helped push the agreement between the United States and Libya to completion).

²⁰⁶ *See Gates*, 755 F.3d at 570 (resolving a dispute between different victims of terrorist attacks); Rodriguez, *supra* note 12, at 5–6 (reporting that there was not enough money in the 9/11 funds to fully compensate everyone). It is telling that Kenneth Feinberg, the administrator of many different victim compensation funds, openly advocated for fixed compensation schemes where every victim with the same kind of injury receives the same amount of money, regardless of their claims. Rodriguez, *supra* note 12, at 5–6. This demonstrates how difficult and unpleasant it is for victims to fight for their piece of the pie and for any person to decide who gets what at the expense of others. *See id.* at 6 (describing how difficult it was to decide one claimant would get more compensation than their neighbor). Furthermore, the system for which he advocates has its own deficiencies. *See id.* (describing how not everybody is going to be affected the same, even if they both had the same kind of injury). Additionally, it is uncommon for two people who are each injured in a terrorist attack to receive the exact same kind of injury. *See Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 263–67 (D.D.C. 2003) (describing the different injuries suffered by the Ben Yehuda victims). Each of the nine *Rubin* plaintiffs who were injured in the Ben Yehuda bomb blast received different physical, emotional, and psychological injuries. *Id.* It would be futile and unfair to try and group all of them into discrete categories so that the money could be distributed “fairly.” *See id.* (describing how some have suffered more severe injuries than others).

²⁰⁷ *See generally* Petitioner's Brief, *supra* note 24 (describing how the plaintiffs would have easier access to funds without having to compete with one another).

With more opportunities to execute these judgments, victims would not have to rely on diplomatic agreements and would have a much better chance of receiving fair compensation in a timely manner.²⁰⁸ Not only would the timeline be shortened, but the amount of money that individual victims could recover would likely increase.²⁰⁹ Rather than waiting years to receive a fraction of what they are owed, victims could be paid quickly and in full by those responsible for their damages.²¹⁰

Expanding § 1610(g) would have provided a valuable lifeline to victims and would also have relieved American diplomats of a potentially restrictive burden.²¹¹ The diplomatic agreements with Libya, Iran, and Sudan demonstrate how difficult it is to balance the interests of American victims on one hand with the international interests of the country on the other.²¹² If victims could more easily use the judicial system to receive compensation for their injuries, they would not be forced to rely on diplomatic negotiations where they can be reduced to an after-thought.²¹³

C. Effects of an Expanded § 1610(g) on Museums and Research Institutions

During oral argument, the Supreme Court raised a concern about what a decision in favor of the *Rubin* plaintiffs would mean for the study and display of foreign antiquities in the United States.²¹⁴ The situation, however, is not as dire as it appears.²¹⁵ Courts have the ability to dictate the terms of any sale of attached property, so it is possible that whoever purchases the Persepolis Col-

²⁰⁸ See *id.* at 26 (arguing that Congress intended § 1610(g) to eliminate obstacles barring American victims of state sponsored terror from enforcing judgments against foreign sovereigns).

²⁰⁹ See Slobodzian, *supra* note 10 (reporting that no individual victim who filed a claim in the BNP Paribas SA fund could receive more than \$20 million and no family could receive more than \$35 million).

²¹⁰ See *Rubin IV*, 138 S. Ct. at 821 (describing the judicial path the plaintiffs took). See generally Petitioner's Brief, *supra* note 24 (explaining how this would be possible).

²¹¹ See Bradley, *supra* note 12 (describing how the U.S. government chose diplomacy over justice for victims); Rodriguez, *supra* note 12, at 5–6 (describing the difficulty victims of 9/11 faced receiving compensation).

²¹² See Broder, *supra* note 21 (reporting that U.S. diplomats justified their decision to pay back the money to Iran by framing it as a bargain because Iran could have gone after more money in an international claim tribunal); Harris, *supra* note 21 (speculating that the Trump Administration did not pay close attention to the Sudan deal because its attention had been elsewhere in international diplomacy); *Libya Pays \$1.5 Billion*, *supra* note 70 (disclosing that U.S. diplomats considered the wishes of the U.S. business community when coming to an agreement with the Libyan government).

²¹³ See Bradley, *supra* note 12 (arguing that the Trump Administration did not take advantage of the leverage it had to make Sudan pay damages to victims of state sponsored terror); *supra* note 128 (recounting how victims of terror have found mixed success in receiving compensation through diplomacy).

²¹⁴ See Transcript of Oral Argument at 16–17, *Rubin IV*, 138 S. Ct. 816 (No. 16-534) (asking about the property rights of the University of Chicago museum).

²¹⁵ See *infra* note 216–219 (describing how there is little danger of property rights surrounding foreign antiquities significantly changing by ruling in favor of an expansive subsection (g)).

lection could be obligated to house the objects at the University of Chicago, or a similar institution, in an arrangement analogous to the one today.²¹⁶

Furthermore, it is possible that the Iranian government may decide to remove the Collection from the University regardless of the outcome in *Rubin IV*.²¹⁷ The University does not own the Collection and does not have any say about its location, no matter how the Court would have ruled.²¹⁸ Without any true ownership rights, the University's concerns are a secondary consideration at best, especially in the face of innocent American victims trying to end a decades-long struggle to receive compensation for their injuries.²¹⁹

CONCLUSION

Rubin v. Islamic Republic of Iran (Rubin IV) provided the United States Supreme Court with a unique opportunity to make a positive and lasting impact on the lives of innocent Americans who had the misfortune of being in the wrong place at the wrong time. There have been many attempts to help American victims of terrorist attacks without much success. Each effort—whether it be from the executive, legislative, or judicial branch—has fallen short due to competing interests, imprecise language, and resource scarcity. Innocent Americans, today and in the future, would have finally found justice if the Court had adopted the correct statutory interpretation and understood how this case fit into the greater landscape of victim compensation. Unfortunately, the Court let the opportunity slip through its grasp. Victims must now continue their interminable search for a fair outcome, without any realistic hopes in sight.

SAM DOUGHERTY

²¹⁶ Transcript of Oral Argument at 5–13, 17, *Rubin IV*, 138 S. Ct. 816 (No. 16-534).

²¹⁷ *Id.* at 13–21.

²¹⁸ *Id.* at 3–5, 18. In a previous attempt to attach Iranian property, the Iranian government took back control over the disputed items and returned them to Iran. *Id.* at 13–21. The Iranian government effectively closed off these items as a way to execute their judgment and is something it could do again with the Persepolis Collection. *See id.* (implying that the same fate could befall the Persepolis Collection because of its similarities with other items that Iran has taken back).

²¹⁹ *See id.* (arguing that concerns over the future of foreign-owned antiquities in the United States are overblown). It is also possible that the safest place for the Persepolis Collection is anywhere but in the hands of the Iranian government, making attachment an even more attractive option. Speichert, *supra* note 85, at 590, n. 277. Governments in Iran and Afghanistan have failed to protect anthropological sites from being attacked or destroyed. *Id.* (citing Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 484 (2008)).